No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT F. FEHLHABER, as Personal Representative of Fred Robert Fehlhaber, deceased,

Petitioner,

—v.—

VERONE MARIN FEHLHABER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

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QUESTIONS PRESENTED

Is a federal court powerless to employ the due process clause to deny enforcement to a state court default judgment based on "egregious" procedural and substantive errors which, the court found, present "a case of injustice"?

After denying enforcement to that judgment in its first published opinion, on rehearing the Fifth Circuit Court of Appeals changed its mind and concluded that it was indeed powerless. It reluctantly enforced—on summary judgment—75% of a $10 million default judgment rendered in a California marital action which was riddled with grave due process violations. In enforcing the judgment, the Court of Appeals announced a dangerously relaxed due process standard which warrants review in this Court, and creates a conflict between the Fifth and Fourth Circuits.

One of the due process violations committed by the California court—the application of California's quasi-community property law to out-of-state property owned by a non-domiciliary—raises a serious and recurring federal constitutional question which has received scant attention in the lower courts and is a question of first impression in this Court.

We respectfully request that this Court issue a writ of certiorari to review the following questions:

1. Was the Court of Appeals required to enforce a California state court default judgment notwithstanding the facts that:

(a) No proof whatsoever was offered or taken as to the existence, identity, character or value of the alleged marital property "divided" on default by the California court;

(b) The California court failed to divide the alleged marital property in kind, as required by California law, and thereby issued a default judgment which was beyond the scope of the relief requested in the complaint; and

(c) The California court unconstitutionally, and in clear violation of California law, applied California's quasi-community property statute to foreign property owned by a non-domiciliary? So far as we are aware, this Court has never ruled on the constitutional limits on a state's power to apply its own community property law to foreign property.

2. Did the Court of Appeals violate petitioner's due process rights and misconstrue F. R. Civ. P. 56 in affirming the summary judgment of the district court, issued without itself inquiring into, or permitting petitioner to have discovery and trial concerning, issues of fact, including issues which the Court of Appeals held petitioner should have explored in the trial court?

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OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought, reported at 681 F.2d 1015, appears as Appendix A to this petition. Its opinion denying petitioner's petition for rehearing and suggestion for rehearing en banc is Appendix B. The original opinion of the Court of Appeals, dated March 11, 1982 and withdrawn on respondent's petition for rehearing, is reported at 669 F.2d 990 and appears as Appendix C. The opinion of the United States District Court for the Southern District of Florida, not officially reported, is Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1982, and rehearing was denied on April 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1332.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1738 provides in relevant part:

> "Such Acts, records and judicial proceedings [of any State] . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

28 U.S.C. § 2106 provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, de-

cree, or order, or require such further proceedings to be had as may be just under the circumstances."

Relevant portions of California Civil Code sections 4506(1), 4800, and 4803, California Code of Civil Procedure section 580, and California Rules of Court 1234 are reprinted in Appendix E.[1]

STATEMENT OF THE CASE

This case presents a scenario which has become all too common since the advent of "divisible divorce": an attempt by one spouse to secure a judgment respecting alleged marital property from a foreign court far from the marital domicile. What is uncommon about this case—and why it merits review by this Court—is the series of due process violations committed, at respondent's behest, by the foreign court, and the fact that a default judgment recognized as "unjust" has been granted enforcement on summary judgment without the opportunity for trial or even discovery.

Statement of Facts

Petitioner is the personal representative of the late Fred R. Fehlhaber (hereinafter "Fred"), the original defendant in this action. (Fred died in March, 1980, during pendency of the appeal.) Fred married respondent Verone Fehlhaber (hereinafter "respondent") in New York in 1961. They resided together in Florida from 1967 until April 1974, when respondent left Fred and went to California. Just days before she left, respondent filed an application for an absentee ballot, certifying that Florida was her home, for an election in which Fred was running for Mayor of Indian Creek, Florida.

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1 Each Appendix to this Petition is hereinafter abbreviated "App." The Joint Appendix submitted to the Court of Appeals is hereinafter abbreviated "Jt. App."

On May 17, 1974, she filed a California state court action for legal separation, pursuant to Cal. Civ. Code § 4506, seeking a separation, spousal support, attorneys' fees and that "[p]roperty rights be determined as provided by law." (Jt. App. at 7.)

After he was served in Florida with process in the California action, Fred sued for divorce in Florida state court, and respondent was personally served in California as the defendant in the Florida action.

While the Florida action was pending, Fred specially appeared in the California case, under California Rules of Court 1234, for the sole purpose of contesting personal jurisdiction. In July 1974, the California court determined that Fred was "resident, albeit not domicile[d]" in California, to an extent sufficient to permit it to exercise personal jurisdiction over him solely on that basis. (Jt. App. at 58.) In fact, Fred was then a domiciliary and the Mayor of Indian Creek, Florida. After the California court's ruling, Fred took no further part in the California action, and was declared in default.

On July 23, 1974, without contest, the Florida court issued a decree divorcing the parties. Notwithstanding that they were already divorced, respondent continued to prosecute her California action seeking a "separation" of the parties, with Fred remaining in default.[2] In October 1974, the California court, with the Florida decree before it, granted respondent a default judgment for a separation, spousal support, attorneys' fees and costs.

In 1976, respondent prevailed upon the California court, acting through a judge *pro tem*[3], to award her a default

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2 In this action Fred maintains that, under California law, the Florida divorce divested the California court of subject matter jurisdiction over respondent's action. *See Hudson* v. *Hudson*, 52 Cal. 2d 735, 344 P.2d 295, 299-300 (1959). As discussed below, the Fifth Circuit at first largely agreed with that position, but reversed itself on rehearing.

3 Similar to a special master.

judgment for $9,997,000 in cash, purportedly representing one-half of the value of the parties' alleged community and quasi-community property. In issuing this judgment, the California court committed what the Court of Appeals called three "egregious errors". In brief, these errors, discussed more fully below, are as follows:

First, the court acted without receiving *any* proof whatsoever as to the existence or identity or character or value of the alleged marital property. Instead, respondent mailed to Fred in Florida a "request for admissions," containing schedules which incorrectly described and vastly overstated the value of Fred's alleged assets, and *on their face* double-counted millions of dollars of securities. (Jt. App. at 86-98.) Fred did not respond. As a party in default, Fred was prohibited under California law from filing a response. Nevertheless, Fred's silence was accepted as rendering respondent's list conclusive on the existence, identity, character and value of the alleged property. The California judge *pro tem* thus ignored the court's responsibility to require, and absolved respondent of her obligation to provide, proof sufficient to establish her claim—a basic requirement under the law of California and every other jurisdiction of which we are aware.

Second, instead of dividing the assets in kind, as California law prescribes, the court purported to award all the assets to Fred, and awarded plaintiff a default judgment for cash to "equalize" the division. We know of *no* other California case in which such a cash award has ever been sustained. The court's unprecedented departure from the rule had drastic consequences here. Under the in-kind division rule, Fred could have expected at worst a default judgment awarding respondent one-half of the alleged marital property actually in existence. By accepting respondent's inflated list as "proof" of the identity and amount of Fred's assets and then awarding an all cash "offset", the California court issued a default judgment for $10 million cash which, the district court found, *exceeded* many times over Fred's total net worth. (Jt. App. at 120.)

Third, although respondent affirmatively represented that all of Fred's assets were located outside of California, the court applied California's quasi-community property law to "divide" the assets between the parties. Because Fred was not, and had never been, a California domiciliary, that act was plainly beyond the California court's jurisdiction under California law, and was unconstitutional. Fred's property was subject to the laws of Florida or New York, which are *not* community property states.

The Fifth Circuit panel correctly concluded that the California judgment is a "case of injustice." (App. at A-20.)

The Proceedings Below

In October 1975, respondent filed this action in the United States District Court for the Southern District of Florida, seeking to enforce the 1974 California judgment awarding support, attorneys' fees and costs. She later amended and supplemented her complaint to seek enforcement of the 1976 "property" judgment.

The case remained pending in the district court, without trial and without Fred being allowed to conduct the discovery he sought, for three and a half years. Fred requested a deposition of respondent immediately after the action was filed, serving the first of two deposition notices along with his answer to the original complaint. However, the district court granted respondent a protective order, postponing her deposition until one week before trial. On March 8, 1979, with that protective order still in effect, the district court granted respondent's motion for summary judgment for $12.6 million, enforcing the California judgments with interest. Fred was thus deprived of the opportunity to depose respondent, and this case was disposed of without discovery or trial.

The Court of Appeals, in its first opinion, dated March 11, 1982, affirmed only as to the enforcement of the California judgment for support, attorneys' fees and costs, and reversed enforcement of the $10 million property judgment. The court

held that, under California law, the Florida decree had divested the California court of its statutory jurisdiction to determine property rights. Acting under its non-statutory equitable jurisdiction, the California court lacked power to deviate from equal, in-kind division of alleged community property. For this reason, its judgment was subject to collateral attack in California, and therefore not entitled to full faith and credit. The Court of Appeals rested on this subject matter jurisdiction analysis, and did not reach petitioner's due process arguments. Judge Hatchett dissented. (A copy of this opinion is Appendix C.)

On respondent's petition for rehearing, the Court of Appeals withdrew its first opinion, and substituted a new one, affirming enforcement of the judgment as to support, fees and costs, and $7.5 million of the property judgment. The court reversed its earlier holding that the Florida decree had extinguished the California court's subject matter jurisdiction.[4] (The court limited the judgment to $7,500,000 because, under California procedure, respondent was limited on default to recovery of the largest amount specified in the complaint, which alleged that the marital estate was "in excess of $15,000,000.00.")

The panel rejected petitioner's due process claims based on the lack of evidence to support the judgment and the California court's failure to divide the property in kind, holding that those defects did not render the California judgment subject to collateral attack. (App. at A-22.) Although the court branded the California judgment "a case of injustice," it refused to act to correct the injustice or to "require such further proceedings . . . as may be just under the circumstances." 28 U.S.C. § 2106.

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4 The panel's change of heart was based completely upon dictum in an opinion of a California intermediate appellate court which it recognized as dictum and which it misinterpreted. *See* App. at A-11 & n.9. Indeed, the case from which this dictum was drawn did not even consider the jurisdictional effect of a foreign divorce decree.

The panel refused even to act on petitioner's demonstration that the California court's application of California's quasi-community property statute was unconstitutional as well as prohibited under California law. Although it recognized the judgment as "unjust," the court ducked the question, which it characterized as "thoroughly factridden," (App. at A-26) by holding that the issue was not adequately preserved for appeal—despite the fact that the district court had foreclosed any discovery on the fact issues by granting summary judgment.

Following that decision, petitioner applied unsuccessfully for rehearing, and now files this petition.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Misapplied Principles of Due Process and Full Faith and Credit

It is fundamental that a judgment issued in violation of due process is void and not entitled to full faith and credit. This Court reaffirmed last term that "[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 482 (1982) (footnote omitted). *Accord*, *Wetmore* v. *Karrick*, 205 U.S. 141, 149 (1907) (full faith and credit is not required to a judgment "wanting in due process of law").

The Court of Appeals recognized that it was required to test the California judgment under the due process clause before according it full faith and credit. However, that court applied a fundamentally unfair and erroneous standard in making its due process evaluation, and thereby lent its hand to the injustice committed by the California court.

The Fifth Circuit panel said, "We have not concealed our feeling that the California property judgment was unjust."

(App. at B-3.) Yet, it turned a deaf ear to each of petitioner's due process arguments. It did so primarily on the ground that Fred, having been served with process, had *notice* of the California proceeding. For that reason, the panel was willing to tolerate nearly any procedural or substantive error—including the errors it characterized as "egregious". The panel wrote:

> "The due process requirements in a civil case where only property interests are at stake are, of course, much less stringent than in a criminal case involving life and liberty interests. Thus ordinarily all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." (App. at A-19.)

But notice has never been a cure-all for due process violations, nor a basis for conferring jurisdiction to commit due process violations. The Court of Appeals' decision in effect announces "open season" on defaulting defendants, and declares that the federal courts will sanction gross constitutional violations, as long as pro forma notice is put in the mail first. That is not, and should not be, the law. Indeed, as discussed below, the Fifth Circuit's decision stands in sharp contrast to the decision of the Fourth Circuit in *Compton* v. *Alton Steamship Co.*, 608 F.2d 96 (4th Cir. 1979), which sustained a collateral attack on an unjust default judgment, although defendant had concededly received notice. The Fourth Circuit acted on the basis of "fundamental fairness and considerations of justice"—factors which the Fifth Circuit panel apparently found to be irrelevant to due process. 608 F.2d at 107.

We now briefly discuss the major due process violations committed by the California court, any one of which, we submit, warrants collateral attack. These violations, which the Court of Appeals found constitutionally permissible, vividly illustrate the deficiencies of the due process standard applied

by the Fifth Circuit.[5] One of these due process violations—the application of California's quasi-community property law to Fred's foreign property—presents significant constitutional questions of first impression in this Court.

Lack of Any Evidence to Support the Default Judgment

The California court's first "egregious error" was its failure to require or receive *any* proof as to the existence, identity, character or value of the alleged assets it "divided." Both California and federal procedure—as well as the law of every other jurisdiction of which we are aware—require that a plaintiff offer affirmative proof of his case against a defaulting defendant. *Pope* v. *United States*, 323 U.S. 1, 12 (1944); *Geddes* v. *United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977); *Eisler* v. *Stritzler*, 535 F.2d 148, 153-54 (1st Cir. 1976).

In this case, respondent did not even submit so much as her own affidavit at the default hearing. She relied solely on Fred's "failure" to answer her request for admissions, and the court accepted that event as sufficient—notwithstanding the fact that, as a party in default, Fred was *prohibited* from filing any response to the request. Under California law, any attempt by Fred to respond to the request for admissions or otherwise participate in the default hearing would have been void. *Jones* v. *Moers*, 91 Cal. App. 65, 266 P. 821 (1928).

Moreover, respondent took unconscionable advantage of Fred's disability by presenting a grossly inaccurate and overstated list of Fred's alleged assets. The list *on its face* double-counts millions of dollars worth of bonds, first as Fred's personal property, and then as assets of a closely-held corpora-

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5 In addition to the three points on which we elaborate, due process requires that the California judgment not be awarded full faith and credit because that Court was divested of subject matter jurisdiction to proceed under California law when the Florida divorce was entered. *See Hudson* v. *Hudson*, 52 Cal. 2d 735, 344 P.2d 295 (1959); *Patterson* v. *Patterson*, 82 Cal. App. 2d 838, 187 P.2d 113 (1947); *Buller* v. *Buller*, 62 Cal. App. 2d 687, 145 P.2d 649 (1943).

tion. (Jt. App. at 86-98.) It is apparent that the California judge *pro tem* did not cast a critical glance at the asset list before making it the basis of the judgment—if indeed he even read it. The result, as the district court in this action found, was a judgment which exceeded not merely the one-half of Fred's assets to which respondent claimed to be entitled, but far exceeded Fred's *total* net worth.[6]

This colossal error is not a mere question of "damages." The California court did not merely award respondent a little more than she was entitled to. Rather, the Court acted on the basis of a blank record, with no proof before it, and awarded a $10 million judgment on default. It was as if respondent had asked Fred to "admit" (even though he was incapable under California law of denying) to ownership of the Brooklyn Bridge—or, given the double-counting in respondent's list, two Brooklyn Bridges—and then recovered a cash judgment based on Fred's "failure" to deny. Surely mere notice does not cure such a violation of due process!

Failure to Divide the Property in Kind

Nor was "notice" an acceptable excuse for the California court's second "egregious" error, its failure to divide the alleged marital property in kind.

Respondent's California complaint (termed a "petition") did not request a money judgment, but merely that "[p]roperty rights be determined as provided by law." Moreover, respondent's attorney, in his declaration accompanying her January 9, 1976 "notice of motion . . . on reserved issues," which was addressed to Fred, said that the court was being asked to "divide said property equally among the parties. . . ." (Jt. App. at 116.)

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6 The district court made this finding after an evidentiary hearing held in August 1979 in order to set an appropriate supersedeas bond. The court determined that Fred was unable to post bond in the full amount of the $12.6 million judgment, and granted him a stay of execution conditioned upon posting of a $1.5 million bond. (Jt. App. at 170-71.)

The California law which respondent invoked in her complaint authorizes a California court only to make an equal, in-kind division of community property. Cal. Civ. Code § 4800(a). The only permitted exceptions to strict in-kind division are not even arguably applicable here. The closest allows the award of an asset to one party in order to "effect a substantially equal division of the property," when "economic circumstances warrant." Cal. Civ. Code § 4800(b)(1). Thus, where the court finds that a particular asset cannot practicably be divided (such as a horse or a house), it may assign that asset to one party and award the other spouse another asset or a limited cash offset. *In re Marriage of Brigden*, 80 Cal. App. 3d 380, 145 Cal. Rptr. 716 (1978); *In re Marriage of Tammen*, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1976); *In re Marriage of Juick*, 21 Cal. App. 3d 421, 98 Cal. Rptr. 324 (1971) (characterizing § 4800(b)(1) as a "single asset provison").

Respondent did not plead or otherwise assert, her list of alleged property did not show, and the California court did not find, that this exception applied. In fact, respondent's list indicated that the alleged marital property was principally stocks, bonds and cash, all easily divisible in kind. As a defaulting defendant, Fred had a right to rely on the universal rule that a default judgment may not exceed in kind or amount the relief demanded in the complaint and that a judgment in excess of the prayer is void and subject to collateral attack. *See Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Becker* v. *S.P.V. Constr. Co.*, 27 Cal. 3d 489, 493-94, 165 Cal. Rptr. 825, 827, 612 P.2d 915, 917 (1980); Cal. Code Civ. P. § 580. Therefore, Fred had a right to expect that the California court could and would do no more than divide the assets in kind. (In-kind division would at least have circumvented part of the court's error in accepting respondent's unproved list as evidence of Fred's property—a judgment awarding respondent one-half of the Brooklyn Bridge could not have harmed Fred if he did not own it, and could not have deprived him of more than a half interest in it even if he did.)

The California courts have vigorously enforced the in-kind division rule. In *Wilkinson* v. *Wilkinson*, 12 Cal. App. 3d 1164, 91 Cal. Rptr. 372 (1970), as in this case, the husband defaulted, and the trial court awarded him all the community property and ordered him to pay the wife's share in cash. The appellate court voided the award as beyond the prayer:

> "The husband *had a right to rely on the law* . . . and to assume that the court at worst would do no more than award all of the [community property] to the wife. . . . Wife cites cases holding that a court may in its discretion order a defendant to pay a specific sum of money in lieu of a plaintiff's interest in the community property awarded to defendant. . . . In each of those cases, however, both parties appeared in the action and had an opportunity to litigate the issue of the value of the property."[7] *Id.* at 1167, 91 Cal. Rptr. at 373-74. (Emphasis added.)

The Court of Appeals "conceded" that in this respect the California court "may have committed egregious error." (App. at A-12.) However, it distinguished *Wilkinson* solely on the ground that the wife there prayed that the community property be awarded to her, whereas here respondent's petition asked for a property award "as provided by law." To hold that the latter was constitutionally adequate notice while the former was not is baseless. Despite the Court of Appeals' conclusion that Fred should have known that a property determination "as provided by law" might encompass an all-cash award, neither the court nor the parties identified a *single* California case in which such an all-cash award was rendered.[8]

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7 In addition, those cases concerned cash awarded as an offset for a *particular* asset, not an all-cash award of the kind issued here.

8 The Court of Appeals grudgingly admitted that there was "some force" to Fred's argument that the cash judgment exceeded the prayer, and was therefore void and subject to collateral attack. (App. at A-12.) However, the Court upheld most of the all-cash award, primarily on

The Application of California Community Property Law to Out-of-State Property

The most extreme transgression of the California court was its failure to heed constitutional limitations on the reach of California's quasi-community property statute, Cal. Civ. Code § 4803. This too was not a question of "notice", but a fundamental issue of jurisdiction.

Prior to enactment of its quasi-community property statute, California followed the common law rule, which treated property as marital or separate depending upon the law of the marital domicile at the time of acquisition. *See Addison* v. *Addison*, 62 Cal. 2d 558, 43 Cal. Rptr. 97, 399 P.2d 897 (1965). California's original quasi-community property statute, enacted in 1917, altered this rule. It made the domicile of the acquiring spouse irrelevant. If marital property otherwise met the requisites of California law, it was to be treated in a California marital action as community property even if the acquiring spouse was domiciled elsewhere when it was acquired. The statute was held unconstitutional under the due process and privileges and immunities clauses of the Fourteenth Amendment. *Estate of Thornton*, 1 Cal. 2d 1, 33 P.2d 1 (1934).

California enacted the present quasi-community property statute in 1961. The California Supreme Court interpreted the reach of the statute narrowly, and held it constitutional as so limited. The Court held in *Addison*, *supra*, that due process required that the statute could be applied only if both of two conditions were satisfied: (1) both parties had changed their domicile to California, and (2) after their change in domicile,

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the strength of *Badillo* v. *Badillo*, 123 Cal. App. 3d 1009, 177 Cal. Rptr. 56 (1981), which held that a particular unequal property division was not void. However, in *Badillo* a *particular* asset was divided; that case did not deal with an all-cash award remotely similar to the one at issue here. Moreover, *Badillo* was not decided until seven years *after* Fred defaulted. Fred could not have had constitutionally adequate "notice" of a decision that had yet to be written.

both spouses sought an alteration of their marital status in a California court. As the Court stated in *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 106-07, 147 Cal. Rptr. 586, 593 (1978), *cert. denied*, 440 U.S. 915 (1979):

> "[V]ested property rights can be diminished by retrospective application of changes in marital property law if such application is demanded by a sufficiently important state interest . . . . Unless *both* of these conditions exist, the interest of the State of California in the status of the property of the spouses is insufficient to justify reclassification without violating the due process clause of the Fourteenth Amendment and the privileges and immunities clause of article IV, section 2, of the federal Constitution. Additionally, reclassification based upon a mere change of domicile would abridge the privileges and immunities clause of the Fourteenth Amendment." (Emphasis added.)

So far as we are aware, this Court has never addressed the constitutional limits on a state's application of its community property law to foreign property.

It is abundantly clear that these constitutional limits were exceeded here. Fred's property was not located in California. Respondent herself asserted in the California proceeding that Fred "has no known or discoverable assets in California. . . ." (Jt. App. at 83), and the inflated list of alleged property she filed discloses on its face that the alleged property was located in Florida and New York. (Jt. App. at 86-98.) Neither of the two conditions for application of the statute set by the California courts was satisfied. As to the first condition, Fred plainly did not seek in a California court alteration of his marital status. Indeed, he obtained a valid *Florida* divorce and defaulted in California, after making a special appearance to contest personal jurisdiction. Nor was Fred a California domiciliary, as required by the second condition. In fact, this issue was litigated and determined against respondent in the California proceeding, where the court determined that Fred was to

some extent a California resident but was not a domiciliary. (Jt. App. at 58.)

The application of California community property principles to Fred's separate property was an unconstitutional act, beyond the jurisdiction of the California court. The resulting judgment is void and subject to collateral attack.[9]

* * *

Mr. Justice Cardozo wrote of a litigant "caught in a mesh of procedural complexities, [who] is told that there was only one way out of them, and this a way he failed to follow. Because of that omission, he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow." *Reed* v. *Allen*, 286 U.S. 191, 209-10 (1932) (Cardozo, J., dissenting).

The Court of Appeals erred in failing to realize and exercise its power under the due process clause to "set petitioner free" from the unconstitutional and unjust California judgment. Its decision conflicts with the Fourth Circuit's ruling in *Compton* v. *Alton Steamship Co.*, 608 F.2d 96 (4th Cir. 1979), where the Court recognized and exercised its power.

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9 The Court of Appeals refused to address this issue because it held that the question was not properly preserved in the district court. (App. at A-24.) However, as the Court of Appeals noted, Fred raised the issue in his answer, and again in a motion for a "new trial" under Rule 59. (App. at A-24.) Moreover, the Court of Appeals refused to apply the rule that a clear legal error not raised below may nevertheless be addressed on appeal. *See Payne* v. *McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). It so refused on the basis of its assertion that this issue is "factridden." However, as shown in the text, the essential facts showing that the California law could *not* have been constitutionally applied here were admitted by respondent or determined against her in the California proceeding and clearly appeared on the record. We also note, as discussed in Part II below, that the Court of Appeals' finding of open fact questions is particularly ironic, in view of its perception that the property judgment "was unjust" and its refusal to disturb the summary judgment issued without any discovery by the district court.

In *Compton*, as in this case, the Court of Appeals was faced with a manifestly unjust default judgment, based on errors of law and unsupported by competent proof. By blatantly misconstruing the governing statute, the trial court converted a $300 claim into a $58,000 judgment. The Fourth Circuit, however, did not throw up its hands as the Court of Appeals did in this case. It noted that plaintiff had not met his obligations at the default hearing "both to plead and prove that his claim falls within the terms of the enabling statute." 608 F.2d at 101. It then held that the relief granted was so far in excess of the prayer that "the 'mistake' . . . went beyond the ordinary 'mistake;' it resulted in a judgment which . . . was 'void'." 608 F.2d at 106. The Court set the judgment aside in view of the district court's actions in excess of its jurisdiction and violations of the due process rights of a defaulting defendant:

> "[C]onsidering all the circumstances, there has been ample showing of abuse of discretion in this case not merely to warrant but actually to demand the vacation of the statutory wage penalty judgment. It would be unconscionable not to set aside such judgment, when unquestionably there was no basis whatsoever either in fact or in law for such a judgment and when the judgment is practically two hundred times that which could have been entered on plaintiff's claim under the union contract. . . . [F]undamental fairness and considerations of justice, apart from any question of the voidness of the judgment as a matter of law, command that the judgment for statutory penalty wages be vacated." 608 F.2d at 107 (footnote omitted).

These same considerations demand that the California judgment be denied full faith and credit.

The Fifth Circuit's decision has caused manifest injustice in this case; unless this Court intervenes, that decision will serve as a precedent for future injustice. A writ of certiorari should issue in order to allow this Court to clarify the significant questions of due process and full faith and credit raised here,

to resolve the conflict between the Fifth and Fourth Circuits, and to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

II

This Case Should Not Have Been Decided on Summary Judgment

If the Court declines to review the constitutional questions discussed above, it should nevertheless grant certiorari to correct the error of the courts below in deciding this difficult case on summary judgment.

The complex constitutional issues in this case should not have been disposed of through what another Fifth Circuit panel has called the "lethal weapon" of summary judgment. *Brunswick Corp.* v. *Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967). Summary judgment should be used "most sparingly" in cases involving "delicate constitutional rights" and "complex fact situations." *Porter* v. *Califano*, 592 F.2d 770, 778 (5th Cir. 1979). *See Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 153-61 (1970).

If the complaint were not to be dismissed on summary judgment, as Fred asked, Fred should have been allowed to take the discovery he repeatedly requested, and to develop and at a trial present evidence on the jurisdictional facts, the extent and nature of Fred's property, the parties' lack of connection with California, and the blatant misstatements contained in respondent's submissions to the California court. None of this was allowed during the three and a half years this action lay dormant in the trial court. The district court entered summary judgment even while its own protective order, staying respondent's deposition until "seven days before trial", was still in effect.

The Court of Appeals' failure to remand for discovery and trial is particularly unfair because it refused to consider the

quasi-community property issue, which, it held, presented questions of fact which had not been resolved in the trial court. Yet those were questions which Fred wished to explore in the deposition of respondent which he was denied. In his motion for a new trial, Fred explicitly asked for (but was again denied) the opportunity to take discovery on this point:

> "It is a serious question that may have been developed through discovery. . . . that may have established . . . the fact that since Florida was the domiciliary residence of both of the parties the property which had been acquired was not community property under the laws of the State of California or even quasi community property . . . . Serious due process questions could have been developed . . . ." (Record at 1070.)

Summary judgment should not have been granted or affirmed under these circumstances. See *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962) (Rule 56 authorizes summary judgment only "where it is quite clear what the truth is . . . .").

The Court of Appeals failed even to mention petitioner's alternative request for a remand in its August opinion or its opinion denying rehearing, although that argument was made in the briefs, at oral argument, and again in petitioner's petition for rehearing.

If this Court does not choose to review the due process questions discussed in point I, a writ of certiorari should be granted and the case remanded to the district court, pursuant to 28 U.S.C. § 2106, for the discovery and trial which petitioner was wrongfully denied.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals should be granted.

Dated: New York, New York
May 19, 1983

Respectfully submitted,

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APPENDIX A

United States Court of Appeals, Fifth Circuit.*
Unit B

Aug. 6, 1982.

No. 79-2819.

VERONE MARIN FEHLHABER,

Plaintiff-Appellee-
Cross Appellant,

—v.—

ROBERT F. FEHLHABER,

Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING EN BANC

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Before

GODBOLD, *Chief Judge*, HATCHETT, *Circuit Judge*, and MARKEY*, *Chief Judge*.

GODBOLD, *Chief Judge*:

After considering appellee's petition for rehearing en banc and appellant's response thereto, we grant rehearing and withdraw our prior opinion in this case, 669 F.2d 990 (5th Cir. 1982), and issue the following in its stead:

Appellee Verone Fehlhaber brought this diversity of citizenship action in the United States District Court for the Southern District of Florida seeking recognition and enforcement of two judgments entered against her husband in a California action for legal separation. Appellant Fred Fehlhaber seeks to collaterally attack these judgments.

I.

Verone and Fred were married in 1961 in New York. In 1967 they moved to Indian Creek Village, Florida, where they had built a house and where Fred eventually was elected mayor. Beginning in 1969 the Fehlhabers began spending several months a year in California. Fred contends that this was their vacation site; Verone contends that California was their domicile and vacations were taken in Florida. In April 1974 Verone left Fred and moved to California, and on May 17, 1974 she filed an action in California court for legal separation, spousal support, attorney's fees, and a determination of her marital property rights. Fred was personally served in Florida June 5. Six days later, June 11, Fred filed a petition in Florida for

* Honorable Howard T. Markey, Chief Judge for the U.S. Court of Customs and Patent Appeals, sitting by designation.

dissolution of the marriage. Verone was personally served in California.

Fred then made a special appearance in California to contest the court's exercise of personal jurisdiction over him, and lost. He did not file an answer to the complaint, took no further action in defense of the cause, and was declared in default July 22.

Fred pursued his Florida divorce action in defiance of an injunction by the California court. Verone never made an appearance in the Florida case, and the Florida court dissolved the Fehlhabers' marriage July 23, 1974, before the California court had entered any judgments. Nevertheless, the California separation proceedings continued, and in a judgment entered October 4, 1974 the court ordered legal separation and granted Verone $8,500 a month in support retroactive to August 1 and $45,000 in attorney's fees and court costs, while expressly reserving all issues regarding the division of property.

To resolve the reserved property issues Verone served on Fred, who was still in default, a request for admissions concerning the value of their marital property. Fred did not respond. The California court, acting through a judge *pro tem*, took these unanswered requests as admitted and found that the marital estate was worth $19,994,711.14. Rather than dividing the assets in kind, in its March 12, 1976 judgment the court awarded Fred all of the property and awarded Verone a money judgment of $9,997,355.57 as a cash equalization of her share of the property, plus $30,000 for costs and attorney's fees.

With jurisdiction grounded upon diversity of citizenship, 28 U.S.C. § 1332, Verone brought an action in federal district court in Florida to enforce these two California judgments.[1] Fred, in an effort to persuade the district court not to enforce the presumptively valid judgments, based his defense upon

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1 Verone sued to enforce other judgments of the California court as well, but the district court found it unnecessary to enforce them as they overlapped the two discussed above. No cross appeal has been taken on this issue.

numerous challenges to the jurisdiction of the California court and to the validity of that court's judgments. The district court rejected all of Fred's challenges and, considering itself bound by the full faith and credit clause of the U.S. Constitution, granted summary judgment for Verone and entered judgment in her favor: (1) for $516,750, consisting of $471,750 unpaid support from August 1, 1974 and $45,000 unpaid suit costs and attorney's fees; and (2) for $12,114,991.41, consisting of the unpaid cash award of $9,997,355.57 plus interest thereon of $2,081,390.09, and the unpaid attorney's fees and costs of $30,000 plus interest thereon of $6,245.75.

On appeal Fred contends that the district court was in error for the following reasons:

(1) The California judgments are subject to collateral attack;

(2) The Florida divorce divested the California court of jurisdiction over Verone's legal separation action;

(3) The court was not empowered to award a cash offset instead of a division of property;

(4) The default procedures used violated Fred's due process rights; and

(5) The California court unconstitutionally exercised jurisdiction over Fred's property located out of state.

We first outline the requirements of full faith and credit and the rules of collateral attack, and then we examine the asserted defects in the California judgments. We conclude that the judgments are valid and immune from collateral attack except that the judgment of property division grants relief partially in excess of the amount encompassed in Verone's complaint.

II. Full faith and credit and collateral attack

Title 28 U.S.C. § 1738 requires that we give to the California judgments "the same full faith and credit as they have by law

or usage in the courts of [California]."[2] A two-level analysis is employed to determine whether a state court judgment must be enforced under this provision. *See Williams v. North Carolina*, 325 U.S. 226, 228-29, 65 S.Ct. 1092, 1094, 89 L.Ed. 1577 (1945). Where full faith and credit applies a judgment need be given only "the same credit, validity, and effect . . . which it had in the state where it was pronounced." *Williams, supra*, 325 U.S. at 228, 65 S.Ct. at 1094. Thus, if a state court judgment is subject to collateral attack in the state that rendered it, the judgment may be collaterally attacked in federal court.[3] Therefore Verone's contention that California

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2 Section 1738 imposes on the federal courts the same full faith and credit requirements imposed on the state courts by the U.S. Const. art. IV, § 1. *See Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176 (11th Cir. 1981); *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc.*, ___ U.S. ___, ___ n.9, 102 S.Ct. 1357, 1365, 71 L.Ed.2d 558, 570 n.9 (1982) (§ 1738 is "the statutory codification of this constitutional guarantee").

3 This was the holding in *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 614-15, 67 S.Ct. 903, 905-06, 91 L.Ed. 1133 (1947):

> [A] judgment has no constitutional claim to a more conclusive or final effect in the State of the [enforcing] forum than it has in the State where rendered.
>
> . . . .
>
> [I]t is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.
>
> . . . .
>
> It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida.

See also Ford v. Ford, 371 U.S. 187, 192, 83 S.Ct. 273, 276, 9 L.Ed.2d 240 (1962) ("the Full Faith and Credit Clause . . . would require South Carolina to recognize the Virginia order as binding only if a Virginia court would be bound by it"); *Sherrer v. Sherrer*, 334 U.S. 343, 351, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948) (full faith and credit must be accorded where the judgment is not susceptible to collateral attack in courts of the state where rendered); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 (5th Cir. 1974); *Yale v. National Indemnity Co.*, 602 F.2d 642, 644 (4th Cir. 1979).

law should be ignored and that Fred should be required to repair to California courts for his collateral attack is patently incorrect.

The requirement of full faith and credit is tempered, however, by "some basic limitations." *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc.*, ___ U.S. _____, _____, 102 S.Ct. 1357, 1365, 71 L.Ed.2d 558, 570 (1982). The chief such limitation is that full faith and credit will not be given a judgment if the rendering court did not have jurisdiction over the parties and the subject matter. *Id.*[4] Thus the requirement of full faith and credit does not initially attach if the judgment suffers jurisdictional defects that render it void. A judgment is not always open for collateral attack on the grounds of lack of jurisdiction, however. Federal principles of res judicata and collateral estoppel apply even to jurisdictional issues. *Id.* at _____, 102 S.Ct. at 1366; *see* note 27 *infra*.

To summarize this two-level analysis, collateral attack of the California judgments might occur under two sets of principles. Under federal principles we determine whether the judgments possess the requisite validity to apply full faith and credit. If full faith and credit applies we look to state law to determine how much credit they deserve.[5] Conversely put, the California judgments are not to be enforced if they are subject to successful collateral attack either under the "basic limitations" of federal law or under California law.[6]

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4 Another limitation, discussed below in part IV B(2), is that the judgment must comply with the requirements of due process. *See also* note 6 *infra*.

5 Unfortunately California does not have a procedure by which this court can certify to its courts the dispositive questions of state law that must be answered in this case.

6 Recent Supreme Court authority suggests a possible change in analysis from a two-step inquiry to a unified theory of full faith and credit. In its prior decisions the Court has stated that a judgment rendered without subject matter jurisdiction is not given full faith and credit; however, principles of res judicata apply to jurisdictional issues

III. The effect of the prior Florida divorce

During the pendency of Verone's California suit for legal separation, and before any judgment was entered, Fred ob-

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as well as to the merits, and if there has been a full and fair litigation of jurisdictional issues, or even a full and fair *opportunity* to litigate such issues, then possible jurisdictional defects are not considered. *See, e.g., Underwriters National Assurance Co. v. North Carolina Accident and Health Insurance Guaranty Ass'n*, ___ U.S. ___, ___, & n.16, 102 S.Ct. 1357, 1366 & n.16, 71 L.Ed.2d 558, 571-73 & n.16 (1982); cases discussed in note 27 *infra*. This initial federal inquiry into subject matter jurisdiction found in *Underwriters* appears to be abandoned in the Court's decision rendered two months later in *Kremer v. Chemical Construction Corp.*, ___ U.S. ___, ___, 102 S.Ct. 1883, 1897, 72 L.Ed.2d 262 (1982). In *Kremer* the Court explained that the heretofore unannounced source of the "full and fair opportunity" proviso is the due process clause of the Constitution and not federally imposed principles of res judicata. The analysis in *Kremer* has the effect of eliminating the initial inquiry into subject matter jurisdiction because the only concern is whether requirements of due process were met. If there was due process the judgment is enforceable despite a lack of jurisdiction; if due process was not afforded then the judgment is not enforceable regardless of the existence of jurisdiction, see part IV B(2) *infra*. Therefore, the existence of subject matter jurisdiction is as irrelevant to enforcement as is an error on the merits. This approach reduces full faith and credit analysis to only an inquiry into what effect a judgment has in its rendering state, for a state is not allowed to give effect to a judgment rendered in violation of due process.

To summarize, in *Underwriters* and previous cases the Supreme Court has stated that "[i]f [the rendering] court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given, . . . [but] principles of res judicata apply to questions of jurisdiction as well as to other issues," limiting the scope of review over jurisdiction. ___ U.S. at ___, 102 S.Ct. at 1365-66, 71 L.Ed. 2d at 570-71. However, in *Kremer* the Court stated resolutely that "§ 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments," ___ U.S. at ___, 102 S.Ct. at 1897, and implied that due process is the only federally-imposed limitation on full faith and credit.

Because the approach we outline in text has explicit Supreme Court approval, *see, e.g., Williams v. North Carolina*, and because it is not necessary to our decision to resolve the tension in the Supreme Court's cases, see part IV B(2) & n.22 *infra*, we continue to employ the traditional two-step analysis.

tained in Florida a presumptively valid divorce.[7] Subsequently the California court entered a judgment of legal separation and entered the two monetary judgments concerning spousal support and property rights sought to be enforced here. Fred contends that, despite the fact that the Florida decree did not purport to adjudicate support and property rights, the Florida decree had the effect under California law of depriving the California court of further jurisdiction over Verone's legal separation action. We assume arguendo that the prior Florida decree is a matter for collateral attack[8] and find that the Florida divorce did not affect the power or jurisdiction of the California court over the judgments enforced here.

In California "prior dissolution of the marriage is . . . a complete defense to . . . an action [for legal separation]." *DeYoung v. DeYoung,* 27 Cal.2d 521, 527, 165 P.2d 457, 460 (1946) (Schauer, J., concurring); *Hudson v. Hudson,* 52 Cal.2d 735, 344 P.2d 295, 299-300 (1959); *Patterson v. Patterson,* 82 Cal.App.2d 838, 187 P.2d 113, 115 (1947). This requirement of a marriage is a "jurisdictional prerequisite." *Colbert v. Colbert,* 28 Cal.2d 276, 169 P.2d 633, 635 (1946); *Knox v. Knox,* 88 Cal.App.2d 666, 199 P.2d 766, 773 (1948). Fred argues, therefore, that the California court was without subject matter jurisdiction to enter any of its judgments.

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7 Verone was personally served and does not question the validity of the divorce.

8 The district court construed Fred's argument to be one that the California court failed to give full faith and credit to the Florida decree, and it held that this defense was not grounds for collateral attack. We differ in our analysis because we do not view Fred's contention as a mere full faith and credit defense that he might have raised in California. Because the Florida decree concerns only the marital res, and the California judgments sought to be enforced here concern only property and support rights, the California judgments in no way deny effect to the Florida decree. Instead Fred contends that California law gives a jurisdictional impact to the prior Florida divorce.

This argument reasons too broadly. The rationale for the rule that marriage is a prerequisite to such actions is that a prior divorce moots the prayer for legal separation or divorce. *Hudson,* 344 P.2d at 299 (divorce). This does not mean, however, that the prayers for relief concerning the financial matters incident to marriage are mooted. Under the concept of "divisible divorce" a prior divorce does not automatically adjudicate property and support rights. *See* Comment, *Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action,* 10 Pac.L.J. 825, 827 (1979). Thus, in *Hudson, supra,* where the husband obtained a Nevada divorce during the pendency of the wife's California divorce action, the California Supreme Court held that, although the wife's prayer for divorce was mooted, "her prayer for permanent alimony remains to be adjudicated." 344 P.2d at 299. Likewise, in *Leff v. Leff,* 25 Cal.App.3d 630, 634, 102 Cal.Rptr. 195, 204 (1972), the court held that an intervening Nevada divorce did not "affect Wife's right to secure alimony or to share in the alleged California community property. . . . [T]hese issues were subject to litigation and adjudication in the California proceeding; and they were raised by the pleadings." There is no rationale or authority for distinguishing these cases on the ground that the California action we are concerned with was one for legal separation instead of divorce. In both types of actions the marital res is at issue as well as property and support rights. Prior adjudication elsewhere of the marital res does not affect the financial matters.

Fred next contends that although Verone's prayer for determination of her property rights might have survived the Florida divorce, it did so only as an action in equity and not as a statutory action under the Family Law Act, Cal. Civil Code § 4000 *et seq.,* because a prayer for legal separation or divorce is a statutory prerequisite to a determination of property rights under the Act, *see id.* at § 4800. The distinction between an equitable and a statutory action is significant because the court's nonstatutory powers of property division are apparently more constrained. *See Buller v. Buller,* 62 Cal.App.2d

687, 145 P.2d 649 (1949) (no power in nonstatutory action to award an offset; division in kind is mandatory).[9]

The argument that a statutory action for determination of property rights depends on the pendency of a proceeding for dissolution of marriage or legal separation was squarely rejected in *In re Marriage of Lusk*, 86 Cal.App.3d 228, 234, 150 Cal. Rptr. 63, 67 (1978). There the trial court dissolved the party's marriage and entered a judgment reserving jurisdiction over all other matters (custody, support, property division, attorney's fees). The wife challenged this bifurcation of issues on the ground that it would deprive the court of statutory jurisdiction. Although the court might have relied solely on the specific authorizations under the California Family Law Act and its rules to reserve jurisdiction over these ancillary matters, Cal.Civil Code § 4801(a); Cal. Family Law Rules 1287, it reasoned broadly:

> [W]ife contends that adjudication of the dissolution of the marriage would leave the trial court without jurisdiction to make a subsequent order for her support under [the Family Law Act] or ex parte protective orders [under the Act] in respect to the disposition or alienation of property or restraining husband from molesting or disturbing her or the minor children . . . . The argument is that the language of those code sections indicate that such orders may be made only during the pendency of a proceeding for dissolution of marriage and that once the marriage is dissolved, no proceeding will any longer be pending for dissolution of the marriage. We are not so persuaded. In the first place, . . . [i]f the court expressly reserved jurisdiction over such matters, its jurisdiction would not be exhausted . . . . Secondly, if an action is commenced as one for dissolution of the marriage and

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9 This was the reasoning in the original opinion. 669 F.2d 990, 997-98 (withdrawn). We now depart from it because of the California precedent of *In re Marriage of Lusk*, 86 Cal.App.3d 228, 150 Cal.Rptr. 63 (1978), cited to us for the first time in the petition for rehearing.

> involves issues of custody, support, property division and attorney fees, *the fact that the marriage is dissolved does not necessarily require the conclusion that the action is no longer being prosecuted under [the Act]. It would be entirely reasonable to conclude that the action continues to be prosecuted pursuant to [the Act].*

150 Cal.Rptr. at 67. We see no persuasive grounds for not applying this reasoning here. That it might be viewed as dictum is irrelevant, for, where we are bound by state law, considered dictum is to be followed as well as a precise holding. *Mooney Aircraft Inc. v. Donnelly,* 402 F.2d 400, 405 (5th Cir. 1968). Also the fact that in *Lusk* the prior divorce was rendered by the same court in which the property and support issues were pending does not distinguish the case from this case where the prior divorce was a foreign one. In each case the argument advanced is identical, that once the marital res is adjudicated there is no longer statutory jurisdiction under the Family Law Act.

We therefore must conclude that the law in California is that if a marriage exists when an action is commenced under the Family Law Act, the subsequent dissolution of that marriage does not divest a California court of its statutory jurisdiction over property and support issues, even though the court might not have expressly reserved jurisdiction over those matters.

IV. The property division judgment

The property division judgment was a cash award of $9,997,355.57, arrived at as follows. After Fred had been declared in default Verone submitted to Fred a request for admissions concerning the value of their marital estate subject to division under California's community property laws. Fred did not respond. Verone moved to have these unanswered requests taken as admitted. The trial court, acting through a judge *pro tem,* granted this motion and thus found the marital estate to be valued at $19,994,711.14. Rather than dividing the assets in kind or offsetting one asset for another, the court

awarded all of the assets to Fred and granted Verone a cash judgment of one-half this amount as a cash offset in lieu of her entire share of the marital estate. Fred contends that the property judgment was grossly inflated because he is worth less than $7 million. He seeks to attack the judgment on grounds that we divide into three groupings: (1) the cash offset was invalid as exceeding the statutory powers of the California court and as exceeding the prayer for relief in Verone's complaint; (2) the method of proof was so defective as to deny due process; and (3) the California court's exercise of jurisdiction over property located out of state was unconstitutional because Fred was not domiciled in California.

A. Cash offset

In dividing a marital estate California courts are empowered "where economic circumstances warrant" to "award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property." Cal.Civil Code § 4800(b)(1). For example, one spouse might be awarded the television on the condition that the other keep the microwave, if the two are substantially of equal value. The court might also award an asset to one spouse and award the other spouse a monetary judgment as a cash equalization. *See, e.g., Weinberg v. Weinberg,* 67 Cal.2d 557, 432 P.2d 709, 63 Cal.Rptr. 13, 17-18 (1967); *In re Marriage of Clark,* 80 Cal.App.3d 417, 145 Cal.Rptr. 602, 605 (1978). The California Supreme Court has emphasized the broad range of discretion which § 4800 vests in the trial court. *In re Marriage of Connolly,* 23 Cal.3d 590, 603, 153 Cal.Rptr. 423, 430, 591 P.2d 911, 918 (1979) ("considerable discretion," "a maximum degree of allowable flexibility").

Fred argues with some force that awarding a cash judgment as Verone's entire share of the marital estate is unprecedented in California law and that there was a total absence of findings of "economic circumstances" warranting any offset as required by § 4800. Conceding that the trial court may have committed egregious error, we cannot agree that the California court exceeded its powers or jurisdiction in granting an entire cash

offset given the discretionary terms in which § 4800(b)(1) is viewed by the California law.[10] Nor does the failure to find "economic circumstances" render the judgment subject to collateral attack. In *Badillo v. Badillo,* 123 Cal.App.3d 1009, 1012, 177 Cal.Rptr. 56, 58 (1981), the court held concerning an alleged unequal division of property that "even though the offset failed to comply with Civil Code section 4800 . . . the error . . . is not void or subject to collateral attack." An analogous case is *Armstrong v. Armstrong*, 15 Cal.3d 942, 544 P.2d 941, 126 Cal.Rptr. 805 (1976) where the court refused to allow collateral attack of a judgment that permitted a husband to meet his child support obligations by relying on his children's trust funds, even though such a judgment is authorized only upon a finding that the husband did not have sufficient resources of his own, and such a finding was lacking. Similarly here, the lack of the requisite finding of "economic circumstances" does not render the judgment void.

Fred also contends that, assuming the California court acted within its statutory powers, no notice was given in the complaint that a cash offset was sought and therefore the judgment rendered in default is void. California law, like federal, provides that a default judgment "cannot exceed that which . . . [was] demanded in [the] complaint." Cal.Code Civ.Pro. § 580; *see* F.R.Civ.P. 54(c). In California a failure to comply with this requirement renders the judgment void and subject to collateral attack. *Burtnett v. King,* 33 Cal.2d 805, 205 P.2d 657 (1949) (holding no jurisdiction to divide community property where there was no demand for such relief). The policy supporting this rule is that a defendant in default "must be given notice of what judgment may be taken against him." 205 P.2d at 658.

Applying this rule, the court in *Wilkinson v. Wilkinson,* 12 Cal.App.3d 1164, 91 Cal.Rptr. 372 (1970) held that where the complaint prayed "that the community property . . . be

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10 Here we address this defect in jurisdictional terms. We also reject below the contention that the lack of evidence of economic circumstances denied Fred due process. *See* part IV B(2), *infra.*

awarded to the [wife]," a default judgment awarding all of the community property to the husband and awarding the wife a sum of money in lieu of her interest in the community property was void and outside the court's jurisdiction. 91 Cal.Rptr. at 373-74. The court reasoned that "the husband had a right to . . . assume that the court at worst would do no more than award all of the [property] to the wife." *Id.*

Despite the close similarity of *Wilkinson* it is not controlling here. In *Wilkinson* the wife prayed specifically that the community property be awarded to her. Here Verone prayed broadly that "property rights be determined as provided by law" and that the court "render such judgments . . . as are appropriate." As discussed above, the trial court was vested with broad discretion in effecting an offset, and so, absent a restrictive prayer for relief such as that in *Wilkinson*, Fred was put on notice that he was potentially subject to a monetary judgment.[11] The kind of relief awarded was therefore within the prayer for relief.

The cash judgment of $9,997,355.57 exceeded, however, the amount of relief encompassed by the complaint. Section 580, in requiring that a default judgment cannot exceed the prayer for relief, limits the judgment in the amount of relief as well as the kind of relief. *Becker v. S.P.V. Construction Co., Inc.*, 27 Cal.3d 489, 493-94, 162 P.2d 915, 917, 165 Cal.Rptr. 825, 827 (1980). Section 580 is "designed to insure fundamental fairness" through notice to the defaulting party of the amount of the judgment that may be taken against him. *Id.*, 162 P.2d at 918, 165 Cal.Rptr. at 828. One aspect of fundamental fairness, in the view of the California Supreme Court, is "that defaulting defendants should not be subject to damages in excess of

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11 Fred observes that when Verone moved for judgment on the reserved property issues she asked the court more specifically to "divide the property equally among the parties." Had this been an amendment to her complaint *Wilkinson* might apply. It was, however, merely a motion which the California court chose not to grant, and thus when the marital property issues were determined by the California court it was still operating under the broad prayer in the original complaint.

an amount specifically set out in the complaint. . . . If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon the defendant." *Id.*, 162 P.2d at 917-18, 165 Cal.Rptr. at 827-28. Thus, the California Supreme Court has interpreted § 580 to require that unless a specific sum is contained in the complaint, a monetary default judgment is subject to collateral attack. *Id.* *See also Petty v. Manpower, Inc.*, 94 Cal.App.3d 794, 797, 156 Cal.Rptr. 622, 624 (1979) ("It would appear that where no specific amount of damages is requested that any amount would be in excess of that demanded."); *Ludka v. Memory Magnetics International*, 25 Cal.App.3d 316, 323, 101 Cal.Rptr. 615, 619 (1972) (cited with approval in *Becker, supra*).

Verone's general prayer that "property rights be determined" and that the court "render such judgments as are appropriate" does not meet this requirement of specific notice of the amount of cash judgment that Fred was subject to.[12] Allegations

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12 We reject Verone's contention that the rule in *Becker* applies only in contract and tort actions and not in actions under the Family Law Act. It is true that the court in *Becker* relied in part on Cal.Code Civ.Pro. § 410.25 (providing that "if the recovery of money . . . be demanded, the amount thereof shall be stated [in the complaint]"), which does not apply in cases under the Family Law Act, Cal.Code Civ.Pro. § 429.40; California Rules of Court, Rule 1215. But the court also relied on Cal.Code Civ.Pro. § 585(b) (a default judgment may be awarded only "for such sum (not exceeding the amount stated in the complaint)"), which does apply to family law cases. Moreover, the court's reasoning was quite broad, finding the requirement of a specific prayer for damages from the need for "fundamental fairness" enforced by § 580. Therefore, nothing in the *Becker* court's reasoning suggests that its holding would not apply to a cash judgment in lieu of an award of community property assets. (We intimate no view of the requirements of § 580 where the property judgment divides the assets in kind, or offsets one asset for another.) Finally, giving notice of the amount of a cash property division judgment is not inconsistent with the Family Law Rules, for the form pleading provided therein allows the petitioner to specify the kind, amount, and value of property subject to division. California Rules of Court, Rule 1281; *see* Rule 1285.55 (adopted Jan. 1, 1980).

elsewhere in the complaint cure this defect to a certain extent. In her complaint Verone alleged that the marital estate subject to division consisted of property valued "in excess of $15,000,000.00." This specification in the body of the complaint meets the requirements of Cal.Code Civ.Pro. § 580. *Thornson v. Western Development Corp.*, 251 Cal.App.2d 206, 212, 59 Cal.Rptr. 299, 303 (1967) (cited with approval in *Becker, supra,* 27 Cal.3d at 494). Specifying that the value of the marital estate is "in excess of" $15 million does not fully encompass the amount awarded in the property division judgment, however, for that award was based on a valuation of the estate at $19,994,711.14. Verone is limited in her recovery to the "largest amount specifically requested in the complaint." *Becker, supra,* 27 Cal.3d at 493. In *Becker,* the plaintiff prayed for compensatory damages "in excess of $20,000." The California Supreme Court held that the maximum amount of compensatory damages that could be awarded was $20,000, and, following its rules of collateral attack, reduced the judgment to this amount. Likewise, here, the largest cash judgment that Fred could have anticipated from the complaint was $7,500,000, one half of $15,000,000. The judgment in excess of this is open to collateral attack in California and subject to modification. Therefore, the principal amount of the judgment on property rights may be enforced only up to $7.5 million.[13]

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13 This holds only with respect to the cash offset judgment. The judgments for alimony, attorney's fees, and costs are valid despite the failure to specify in the complaint how much was sought for these items. In *Horton v. Horton,* 18 Cal.2d 579, 116 P.2d 605 (1941), a collateral attack was made on support, attorney's fees, and costs judgments rendered in default in a legal separation action. The husband contended that the judgments were void under § 580 because the wife "did not ask for . . . any designated amount of attorney fees, or for any specified sum for [support]." The court held that specific amounts did not have to be designated for these items because "the amount to be granted is largely within the discretion of the trial court" and therefore the judgments were "directly responsive to the wife's prayer for reasonable sums for support, . . . attorney fees and costs." *Id.*, 116 P.2d at 606-07. Moreover, § 580 does not require that alimony even be requested, *see Burtnett v. King, supra,* 205 P.2d at 659, and thus could not require that the amount of alimony be specified.

B. Method of proof

Where damages are unliquidated a default admits only defendant's liability and the amount of damages must be proved. *Uva v. Evans,* 83 Cal.App.3d 356, 147 Cal.Rptr. 795, 800 (1978) ("damages must be proved in the trial court before the default judgment may be entered"); *Petty v. Manpower, Inc.,* 94 Cal.App.3d 794, 798, 156 Cal.Rptr. 622, 624 (1979) ("damages except when fixed by contract must be proved"); Cal.Code Civ.Pro. § 585(b) (procedure for default judgment: "the court shall hear the evidence offered by plaintiff, and shall render judgment . . . for such sum . . . as appears by such evidence to be just"). Fred contends that the sole method of proof of the value of the marital estate was that the California court took his failure to respond to Verone's request for admissions as being an admission of the facts stated therein. As Fred describes California law, once he was in default he no longer had a right to appear in court to respond to the request for admissions, *see Jones v. Moers,* 91 Cal.App. 65, 266 P. 821, 822 (1928), and therefore there was an entire lack of proof of the amount of relief. Assuming the truth of these contentions, this procedure is not grounds for collateral attack under either California or federal law.

(1) California law

Despite the mandatory nature of the requirement in Cal.Code Civ.Pro. § 585(b) that proof be taken to justify the amount of a default judgment, the requirement is not "jurisdictional" under California law and therefore does not subject an irregular default judgment to collateral attack.[14] The rule in California is that generally failure of the court to comply with the requirements of § 585(b) constitutes "at most but an erroneous exercise of jurisdiction . . . [and] not an absence of

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14 A failure of proof may be raised on appeal from the default judgment, however. *Uva v. Evans, supra,* 147 Cal.Rptr. at 799-800. As discussed below, although Fred was served with the property judgment, he failed to appeal or to move to set it aside.

jurisdiction; . . . [a] judgment entered by a court [not in conformity with § 585(b)] is therefore merely voidable, and not void, and can only be attacked by appeal or motion made within six months thereafter." *Baird v. Smith*, 216 Cal. 408, 14 P.2d 749, 751 (1932). This general statement holds true for § 585(b)'s requirement of proof. An analogous provision is Cal. Civil Code § 4511, which requires in divorce proceedings that "no decree of dissolution can be granted upon . . . default . . . but the court shall . . . require proof of the grounds alleged." In *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 341 (1925), the court held that "a failure to comply with the requirements of this section would not render the judgment void" but "results in mere error, correctible only by means of a direct attack." Moreover, outside of the default context the California Supreme Court has twice stated that even a judgment entered without a trial cannot be attacked collaterally. *Gray v. Hall*, 203 Cal. 306, 313, 265 P. 246, 251 (1928); *Ex Parte Bennett*, 44 Cal. 84, 87 (1872).

(2) Federal principles

Under federal law, Fred contends that the total lack of competent proof of the value of the marital estate is grounds for denying full faith and credit because the lack of proof violates due process of law. A judgment rendered in violation of due process is indeed void and therefore need not be enforced under 28 U.S.C. § 1738 or the full faith and credit clause of the Constitution. *Kremer v. Chemical Construction Corp.*, ____ U.S. ____, ____ & n.24, 102 S.Ct. 1883, 1897 & n.24, 72 L.Ed.2d 262 (1982) ("A state may not grant preclusive effect . . . to a constitutionally infirm judgment and other state and federal courts are not required to accord full-faith-and-credit to such a judgment."); *Wetmore v. Karrick*, 205 U.S. 141, 149, 27 S.Ct. 434, 436, 51 L.Ed. 745 (1907) (full faith and credit does not apply to a judgment rendered without jurisdiction "or otherwise wanting in due process of law,"); *Simer v. Rios*, 661 F.2d 655, 663 (7th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1773, 72 L.Ed.2d 177 (1982);

Compton v. Alton Steamship Co., 608 F.2d 96, 106 (4th Cir. 1979); *VTA, Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979); *O'Boyle v. Bevil*, 259 F.2d 506, 516 (5th Cir. 1958), *cert. denied*, 359 U.S. 913, 79 S.Ct. 590, 3 L.Ed.2d 576 (1959) (Cameron, J., concurring); *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir.), *cert. denied*, 338 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949) ("a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally . . . by resistance to its enforcement if a civil judgment"); 1B *Moore's Federal Practice* ¶ 0.406[2], p. 905; 7 *id.* at ¶ 60.25[2], p. 309-11.

The due process requirements in a civil case where only property interests are at stake are, of course, much less stringent than in a criminal case involving life and liberty interests. Thus ordinarily all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack. *See Windsor v. McVeigh*, 93 U.S. 274, 282, 23 L.Ed. 914 (1876); 7 *Moore's, supra*, at ¶ 60.25[2], p. 309-10. However, "a departure from established modes of procedure [can] render the judgment void," *Windsor, supra*, 93 U.S. at 283, where the procedural defects are of sufficient magnitude to constitute a violation of due process, or, as sometimes more circularly put, where the defects are "so unfair as to deprive the . . . proceedings of vitality," *Eagles v. U.S.*, 329 U.S. 304, 314, 67 S.Ct. 313, 319, 91 L.Ed. 308 (1946), or where the procedural irregularities are serious enough to be deemed "jurisdictional," *Yale v. National Indemnity Co.*, 602 F.2d 642, 644 (4th Cir. 1979); *Recent Cases*, 62 Harv.L.Rev. 1400, 1401 (1949). *See generally Restatement of the Law of Judgments* § 8 (1942).

The leading case allowing collateral attack of a default judgment for procedural errors during the course of a jurisdictionally proper proceeding is *Bass v. Hoagland*, 172 F.2d 205 (5th Cir.), *cert. denied*, 359 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949), *noted in Recent Cases*, 62 Harv.L.Rev. 1400. In *Bass* the plaintiff sued to enforce a default judgment obtained in

another federal court. In the original trial court the defendant appeared, answered, and requested a jury trial. Defense counsel then withdrew. On the day of trial defendant was not present. The trial judge treated the defendant in default because of the earlier withdrawal of his counsel and entered judgment for the plaintiff in the precise amount requested in his complaint, without a jury trial and apparently without taking any evidence. Defendant was not aware of the trial date, was given no notice prior to the entry of the default judgment, and was fraudulently not informed of the judgment until more than two years after it was entered. The court held that the combination of these errors resulted in a denial of due process.[15]

The alleged procedural errors in the instant case, although they are serious and "seem to present a case of injustice," *Bass, supra*, 172 F.2d at 208, do not approach the level of irregularity found in *Bass* to constitute a due process violation. In *Bass* the initial entry of default was held invalid because it was entered for improper grounds. *Id.* at 209-10.[16] This alone might warrant collateral attack. *See Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (holding default judgment subject to collateral attack where entered improperly as a punishment for contempt); *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876) (same for default entered because defen-

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15 Professor Moore rejects a reading of *Bass* under which collateral attack was allowed for one of the procedural errors in favor of a reading that only the combination of errors opened the default judgment to attack:

> Implicit in the court's opinion is the belief that the combined procedural irregularities had resulted in injustice. . . . It is believed that the case does not stand for the bare proposition that [the denial of a jury trial was] so fundamental that it is the basis for a collateral attack. Certainly the case cannot be supported if that is what it stands for.

5 *Moore's, supra*, at ¶ 38.19[3], p. 174.

16 The default was entered because of the withdrawal of Bass's counsel, not because of the nonappearance or default of Bass himself.

dant was a confederate). Here Fred was properly found in default for failing to answer. The *Bass* court also found that, even if entry of default was proper, entry of the default judgment was not preceded by three days notice as required by federal rules. *Id.* at 209, 210. In this case Fred was notified prior to the determination of the property issues. Also, unlike the defendant in *Bass*, Fred was served with the property division judgment and therefore might have appealed it or moved to set it aside under the more lenient "six month" rules. *See* Cal.Code Civ.Pro. § 473 (allowing relief from judgment within six months for, *inter alia*, surprise and excusable neglect). Finally, in *Bass* the court gave considerable emphasis to the denial of the defendant's Seventh Amendment right to a jury trial. 172 F.2d at 209, 210. Unlike in *Bass*, Fred does not claim a constitutional right to a jury trial in the California state court, nor did Fred make a demand for a jury trial.

The only respect in which this case and *Bass* are similar is the allegation that there was a total lack of evidence to support the amount of the award.[17] This is not a sufficient irregularity under federal principles to subject the California judgment to collateral attack. First, there is no indication from *Bass* that the lack of evidence on damages alone would have subjected the judgment to collateral attack. This was one of many defects recited by the court as leading to the conclusion that due process was not afforded. *See* 172 F.2d at 209. Second, regardless of what due process requires where a defendant has not defaulted,[18] the Supreme Court has stated that no hearing

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17 Fred contends that there was no evidence of the value of the marital estate and no evidence to support a finding of economic necessity to award a cash offset.

18 Some courts are of the view that due process is met even though there is an entire lack of evidence, *see* 49 C.J.S. Judgments § 432 (1947) (collecting state cases); part IV B(1) *supra*. The Supreme Court has indicated, however, that some civil judgments may be collaterally attacked where "there was no evidence to support the order." *Eagles, supra*, 329 U.S. at 312, 67 S.Ct. at 317. This statement was made in the context of cases involving liberty interests (military induction; deportation) and attackable by writ of habeas corpus.

at all is required by the due process clause when a defendant is in default. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971).[19] Because Fred was properly held in default no hearing on damages was required by procedural due process; therefore any deficiencies in the proof of damages did not deny Fred the process he was due. Finally, Fred was not entirely foreclosed from presenting proof of the value of his estate. Even assuming he was barred from appearing at the damage hearing while in default, he might have moved to vacate the default[20] or to set aside the default judgment, and he might have appealed the default judgment. *See* note 14 *supra*.

The holding in *Bass* is a rare exception to the normal rules of collateral attack. 6 *Moore's, supra*, at ¶ 55.09, p. 204 ("an occasional atypical case" not establishing a general rule); 7 *id.* at ¶ 60.25[2], p. 309-11. While the principle of *Bass* has full effect in this court, *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), it does not apply on this set of facts.[21]

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19 "Due process does not . . . require that the defendant in every civil case actually have a hearing on the merits. A state can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance. . . ."

Bass does not conflict with this view, for there the defendant had not defaulted but was erroneously treated in default for the withdrawal of his counsel.

20 Fred was given notice by Verone that she intended to request the California court to accept the unanswered requests for admissions as admitted.

21 Fred also places reliance on *Compton v. Alton Steamship Co.*, 608 F.2d 96, 105-107 (4th Cir. 1979), holding void a default judgment because "the plaintiff's express allegations, reinforced . . . by plaintiff's direct proof at the damages hearing established indisputably that he was not entitled to recover . . . ." The instant case is not as egregious. Although part of the judgment exceeded the amount prayed for, and to that extent we have granted Fred relief, *see* part IV A, *supra*, the remainder of the judgment was within the complaint. Moreover, the evidence in the California proceeding did not "indispu-

No lesser ground than a judgment rendered in violation of due process will suffice for collateral attack in this case. Fred contends that collateral attack is allowed in order to avoid manifest injustice. *Garner v. Giarrusso,* 571 F.2d 1330, 1336 (5th Cir. 1978); *Tipler v. E.I. duPont de Nemours and Co.,* 443 F.2d 125, 128 (6th Cir. 1971). The authorities cited for this proposition all arise in the administrative agency context, however, where principles of res judicata do not apply with as great a rigor but instead "the traditional doctrine . . . [is] qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice." K. Davis, *Administrative Law Treatise* § 18.03, p. 553 (1958). In civil court cases, while there might be isolated instances where the principles of res judicata do not apply with full force, *see* 1B *Moore's, supra,* at ¶¶ 0.405[11], [12], there is no general equitable exception to the doctrine, *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103, 110 (1981), and the facts of this case do not fall within any of the developed exceptions, *see Key v. Wise,* 629 F.2d 1049, 1067 (5th Cir. 1980), *cert. denied,* ____ U.S. ____, 102 S.Ct. 682, 70 L.Ed.2d 647 (1981); *compare* 1B *Moore's, supra,* at ¶¶ 0.405[11], [12].[22]

C. Jurisdiction over quasi-community property

Virtually all of the property that was the basis for the property division judgment was located outside of California.

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tably" establish that Verone was not entitled to recover. *See also* note 22 *infra*.

22 The discussion in text explains that possible exceptions to full faith and credit do not apply on the facts of this case. Moreover, even if the suggested exceptions were applicable on these facts, the exceptions may not be relevant to state judgments under a full faith and credit analysis. These exceptions were developed in the context of the enforcement of *federal* judgments, and, as discussed in note 6, *supra*, federal principles of res judicata may not be relevant to state judgments. In short, not every defect that renders a judgment "void" under federal law may suffice to deny effect to *state* judgment under the full faith and credit clause of § 1738.

The California court exercised jurisdiction to divide the property under California's "quasi-community property" statute, which treats as community property all property acquired by a spouse while domiciled elsewhere that would have been community property if the spouse had been domiciled in California at the time of acquisition. Cal. Civil Code § 4803. Fred contends that under the laws of Florida, where he claims to be domiciled, this property is not subject to division and that therefore application of California's quasi-community property statute was unconstitutional because he has insufficient contacts with the state.

The district court did not address this contention so we must determine whether it was adequately presented below. This defense was first mentioned obliquely in Fred's answer to the supplemental complaint,[23] and again mentioned in his "motion for a new trial" filed after the district court's entry of summary judgment for Verone.[24] For several reasons, neither instance was sufficient to preserve the issue for appeal.

First, the defense concerning quasi-community property mentioned in Fred's answer to the supplemental complaint was abandoned. At no time during the lengthy district court proceedings did Fred develop this argument in his briefs to the court, through oral argument, or through citation of authority. In particular, the point was not even mentioned in the two

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23 The defense was not framed in constitutional terms:

> The Defendant further denies that the Courts of the State of California had jurisdiction over the real and personal property of this Defendant, which real and personal property was located outside the territorial limits of the State of California.

24 "It is a serious question that may have been developed through discovery . . . that may have established or led toward the establishment of the fact that since Florida was the domiciliary residence of both of the parties the property which had been acquired was not community property under the laws of the State of California or even quasi-community property since it was all acquired outside of the State of California when neither of the parties were domiciliaries of the State of California. . . . Serious due process questions could have been developed. . . ."

briefs filed by Fred in opposition to summary judgment. Failure to brief and argue an issue is grounds for finding that the issue has been abandoned. *See U.S. v. Indiana Bonding & Surety Co.*, 625 F.2d 26, 29 (5th Cir. 1980) (defense waived even though listed in pretrial order because no evidence presented and not mentioned in proposed findings of facts and conclusions of law); *Tedder v. F.M.C. Corp.*, 590 F.2d 115 (5th Cir. 1979) (point abandoned on appeal where raised in statement of issues but not addressed elsewhere in brief). We do not rest on this default alone, however, for Fred did not include this defense in his pretrial stipulation of the issues to be determined by the court. The district court ordered the parties to reach an agreed pretrial stipulation. Fred filed his unilaterally and Verone accepted with some changes not relevant here. We find, then, as in *Tomlinson v. Lefkowitz*, 334 F.2d 262, 263 (5th Cir. 1964), cert. denied, 379 U.S. 962, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965) that:

> [t]he parties agreed by stipulation . . . what issues of fact and law were to be decided by the trial court. This point was not included in those issues remaining open for consideration. Thus the appellant should not be permitted to raise the issue here for the first time.

See also Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co., 629 F.2d 1118, 1123 (5th Cir. 1980) (" 'When the defendant has waived his affirmative defense by failing to . . . have it included in a pretrial order of the district court that superseded the pleadings, he cannot revive the defense in a memorandum in support of a motion for summary judgment.' "); F.R.Civ.P. 16 (pretrial order "when entered controls the subsequent course of the action").

Second, the thirteenth-hour raising of the issue in Fred's motion for a new trial will not cure these defaults. Again, the point was not briefed, nor was it mentioned in the hearing the court held on the motion. Moreover, an argument first raised in a postjudgment motion "is simply too late." *Excavators & Erectors, Inc. v. Bullard Engineers, Inc.*, 489 F.2d 318, 320 (5th Cir. 1973). *Accord Hanson v. Denckla*, 357 U.S. 235,

243-44, 78 S.Ct. 1228, 1234, 2 L.Ed.2d 1283 (1958) (argument raised in lower court for first time in motion for rehearing was "not seasonably presented" and need not be addressed on review); *Sanford Brothers Boats, Inc. v. Vidrine,* 412 F.2d 958, 971 (5th Cir. 1969).

An issue not properly preserved for appeal will generally not be considered unless the issue is a purely legal one and the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice. *Payne v. McLemore's Wholesale & Retail Stores,* 654 F.2d 1130, 1145 (5th Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). Here we find that neither prong of the "plain error" exception is met. First, this issue is thoroughly factridden. It depends on whether Fred and Verone were domiciled in California,[25] which assets are located out of state and their value, and whether those assets were acquired at a time when the acquiring spouse was not domiciled in California.

Second, California's exercise of jurisdiction over the marital assets does not plainly render the property judgment subject to collateral attack. Assuming that an unconstitutional exercise of jurisdiction occurred, it is possible that taking cognizance of this jurisdictional defect is foreclosed under principles of res judicata.[26] Although judgments void for lack of jurisdiction will not be enforced, jurisdiction may not be questioned if the issue was fully and fairly litigated in the rendering court,

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25 This issue was disputed by the parties in the California court when Fred made a special appearance to quash summons but was never adjudicated. The court ruled that Fred was a resident and that this was sufficient under California's long arm statute, even in matrimonial cases. No ruling was made whether Fred was a domiciliary.

26 We examine federal principles in text. It is clear that the defect would not be subject to collateral attack in California as well, because there the lack of jurisdiction must appear affirmatively on the face of the record. *Texas Co. v. Bank of America National Trust & Sav. Ass'n.* 5 Cal.2d 35, 53 P.2d 127, 130-31 (1935). Because of the undeveloped factual matters on which Fred's argument depends, this requirement is not met.

Underwriters National Assurance Co., supra, ____ U.S. at ____-____, 102 S.Ct. at 1315-68, 71 L.Ed.2d at 570-74, or, even if not litigated, if the attacking party had a full and fair opportunity to litigate the issue, *Sherrer v. Sherrer,* 334 U.S. 343, 351, 68 S.Ct. 1087, 1091, 92 L.Ed. 1429 (1948). Fred made a special appearance in California to quash service of process, contending in part that simple residence was not constitutionally sufficient to support jurisdiction in a matrimonial case for "purpose of support, attorney's fees or other in personam orders," but instead domicile is required. The court ruled that residence was sufficient. Thus, the alleged unconstitutionality appears to have been fully litigated and decided in the California court, which would foreclose Fred from any collateral attack on this issue.[27]

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27 Even if the issue were not actually litigated, it is arguable that because Fred was served with proper service of process and given notice of the California proceedings his *opportunity* to raise the issue was sufficient to foreclose any consideration of the issue in defense to full faith and credit enforcement. Had Fred made a general appearance in the California court he could not now question jurisdiction. *Sherrer, supra.* Fred distinguishes *Sherrer* on the basis that he defaulted and made no general appearance. The res judicata effect of a default judgment on jurisdictional defects is an unsettled question, however, see *Sherrer,* 334 U.S. at 353, 68 S.Ct. at 1092; *Developments in the Law of Res Judicata,* 65 Harv.L.Rev. 818, 853 n.258 (1952), some scholars arguing that a default judgment has the same effect, K. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments,* 66 Cornell L.Rev. 534, 551-54 (1981), and others arguing that jurisdictional defects in default judgments should always be open for collateral attack, Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems,* 66 Cornell L.Rev. 564, 591 (1981); *Restatement (Second) of Judgments* § 12 & comment f, § 65 & comment b (1982). Because there is no definitive law on the question the merit of Fred's omitted defense was not so plain or obvious that it is manifest injustice not to consider the defense.

V.

In this bitter and protracted litigation Verone is largely successful. The majority of defects in the two California judgments awarding support and community property are either nonexistent or not subject to collateral attack either under federal principles limiting full faith and credit or under California principles of collateral attack. California law does allow limited collateral attack of the default property judgment because it grants more relief than requested in the complaint, so we find that, with respect to the principal amount awarded by its terms, enforcement of the property judgment is limited to $7,500,000.

Rehearing GRANTED, prior opinion WITHDRAWN and new opinion filed. The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX B

United States Court of Appeals, Fifth Circuit*
Unit B

April 4, 1983.

No. 79-2819.

VERONE MARIN FEHLHABER,

Plaintiff-Appellee,
Cross-Appellant,

—v.—

ROBERT F. FEHLHABER as personal representative of FRED ROBERT FEHLHABER, deceased,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING and PETITION FOR REHEARING EN BANC

(Opinion March 11, 1982, 5 Cir., 1982, 669 F.2d 990)

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Before

GODBOLD, Chief Judge, HATCHETT, Circuit Judge, and MARKEY*, Chief Judge.

GODBOLD, *Chief Judge:*

On petition for rehearing en banc by Verone Fehlhaber we withdrew our original opinion[1] largely favorable to Fred Fehlhaber and substituted a new opinion largely favorable to Verone. 681 F.2d 1015. We now have before us the petition for rehearing en banc by Fred[2] directed to the substituted opinion.

Fred asserts that we have failed to give proper recognition to the "manifest injustice" exception to the usual rules of res judicata. He relies on the *Greenfield* line of cases, *Greenfield v. Mather,* 32 Cal.2d 23, 194 P.2d 1 (1948). In *Greenfield* the California Supreme Court held by a bare majority that in the context of a marital dispute a prior judgment was not a bar to a subsequent decision concerning property issues because there were "no pleadings or evidence on the issue claimed to be adjudicated" in the prior action. 194 P.2d at 8. Justice Traynor dissented, joined by two other of the seven justices.

Greenfield has only dubious present validity. In *Slater v. Blackwood,* 15 Cal.3d 791, 796, 543 P.2d 593, 595, 126 Cal.Rptr. 225, 227 (1975), the California Supreme Court said:

> We consider the *Greenfield* doctrine of doubtful validity and it has been severely criticized. (*See* 4 Witkin, [Cal.Proc. (2d Edition 1971)], Judgment, Sec. 150, p. 3295, et seq.) While we find it unnecessary for our present purposes to reach the question of whether *Greenfield*

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* Honorable Howard T. Markey, Chief Judge for the Federal Circuit, sitting by designation.

1 Which had appeared at 669 F.2d 990.

2 Who died pending this appeal.

> itself should be directly overruled, we expressly hold that the rule of that case is inapplicable [on the facts of this case].

But even if *Greenfield* is still alive it should not govern here. We have not concealed our feeling that the California property judgment was unjust. But we do not sit as roving chancellors to deny full faith and credit to any judgment that we consider unjust. The bounds of the constitutional structure are not the length of the chancellor's foot. Moreover, Fred's equitable position is not so strong as he asserts. He was given full and proper notice of the California proceedings, specially appeared to contest jurisdiction, lost on this issue, and then ignored the proceedings. He did not act in ignorance but rolled the dice and lost. He was given specific notice that Verone intended to have the request for admissions deemed admitted by his failure to respond. *See* fn. 20 in our opinion, 681 F.2d at 1029. He was served with the property division judgment and did not seek relief against it in the courts of California. *Id.* at 1028. To the extent that California judgments exceeded the scope of issues raised in the complaint, we have granted relief to Fred. *Id.* at 1025-26. We addressed in our opinion each of the specific defects claimed by Fred to exist and concluded that none of these defects is ground for collateral attack. *Id.* at 1028-29.

In our opinion, 681 F.2d at 1023, relying on *In Re Marriage of Lusk,* 86 Cal.App.3d 228, 234, 150 Cal.Rptr. 63, 67 (1978), we held that the Florida divorce did not divest the California court of its statutory jurisdiction over property and support issues even though the court might have expressly reserved jurisdiction over those issues. We quoted from *Lusk* saying:

> . . . the fact that the marriage is dissolved does not necessarily require the conclusion that the action is no longer being prosecuted under [the Act]. It would be entirely reasonable to conclude that the action continues to be prosecuted pursuant to [the Act].

681 F.2d at 1023. This quotation should have read:

> . . . the fact that *the issues are bifurcated* and the marriage is dissolved does not necessarily require the

> conclusion that the action is no longer being prosecuted under [the Act]. It would be entirely reasonable to conclude that the action continues to be prosecuted pursuant to [the Act].

150 Cal.Rptr. at 67. The words that we have underlined were omitted. Fred points out this omission and urges that it should change our conclusion because in *Lusk* the case was expressly bifurcated while the present case was not. Fred argues that where dissolution of the marriage occurs and the pending California case has not been bifurcated the court's statutory jurisdiction over the case terminates and its subsequent judgment should, therefore, not be enforced in Florida.

The words "the issues are bifurcated and" were omitted by clerical error in typing the last draft of our opinion. The court had before it the correct language from *Lusk*, and it did not misconstrue this language. The court in *Lusk* gave two distinct reasons for continued jurisdiction after dissolution of the marriage. The first given was that the lower court had made an express reservation of jurisdiction pursuant to the statute and the Family Law Rules. The principal thrust of the court's second rationale was the reasoning that because the action was properly commenced under the statute and raised issues of property division, child and spousal support, and attorney's fees, as well as issues concerning the marital res, statutory jurisdiction was retained by the lower court until all these issues were disposed of. "Bifurcation" does not have the same meaning as "express reservation of jurisdiction." Bifurcation is merely a procedural order of severance, governing the order and conduct of the trial of issues, and in and of itself does not affect jurisdiction. Reservation of jurisdiction is an entirely distinct step and occurs at a stage where an interlocutory judgment is entered on a previously bifurcated or severed issue. It is clear that these are the meanings given to these terms by the court in *Lusk*. *See* 150 Cal.Rptr. at 65-66. Moreover, the *Lusk* court, in explaining the holding of a prior related case, *In Re Marriage of Fink*, 54 Cal.App.3d 357, 126 Cal.Rptr. 626 (1976), concluded that the Family Law Act, as

augmented and interpreted by the Judicial Council Rules, authorized a trial court not only to bifurcate the trial but to enter a separate interlocutory judgment of dissolution before other issues have been litigated. 150 Cal.Rptr. at 66. We conclude that once a California statutory proceeding is properly initiated, subsequent dissolution of the marriage has no effect on the court's continued jurisdiction of other issues determinable in a proceeding brought under the Family Law Act.

We declined to address Fred's contention that the California court acted beyond its jurisdiction in applying California's quasi-community property law to assets located outside the state, because the point had not been adequately preserved for appeal. 681 F.2d at 1030. Fred's petition does not directly challenge the finding that the issue was not properly preserved. While he notes that the issue was raised in his answer to the supplemental complaint, as we acknowledged in our opinion at p. 1030, he does not respond to the fact that the issue was abandoned by failure to raise it in either of his two briefs in response to the motion for summary judgment and by failure to include it in the pretrial stipulation entered into by the parties that established the issues to be tried. We adhere to our conclusion that there are not adequate reasons to excuse this failure to properly raise the issue below.

The petition for rehearing by Fred Fehlhaber is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the suggestion for Rehearing En Banc is DENIED.

APPENDIX C

United States Court of Appeals, Fifth Circuit.*
Unit B

March 11, 1982

No. 79-2819.

VERONE MARIN FEHLHABER,

Plaintiff-Appellee-Cross Appellant,

—v.—

ROBERT F. FEHLHABER as personal representative of FRED ROBERT FEHLHABER, deceased,

Defendant-Appellant-Cross Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before

GODBOLD, *Chief Judge*, HATCHETT, *Circuit Judge*, and MARKEY**, *Chief Judge*.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

** Honorable Howard T. Markey, Chief Judge of the U.S. Court of Customs and Patent Appeals, sitting by designation.

GODBOLD, *Chief Judge*:

Appellee Verone Fehlhaber brought this diversity of citizenship action in the United States District Court for the Southern District of Florida seeking recognition and enforcement of three judgments entered against her husband in a California action for legal separation. Appellant Fred Fehlhaber challenges the jurisdiction of the California court to render the judgments.

I.

Verone and Fred Fehlhaber were married in 1961 in New York. In 1967, six years later, they moved to Florida. Beginning in 1969 the Fehlhabers spent several months a year in California (annual vacation of four months each summer according to Fred Fehlhaber; seven or eight months residency a year with annual vacations to Florida according to Verone Fehlhaber). Although the chain of events surrounding the initial period of estrangement is hotly disputed, it is enough for this litigation that Verone went to California April 14, 1974, leaving Fred in Florida. The Fehlhabers agree that they separated May 15, 1974. Two days later, May 17, 1974, Verone filed an action in a California court for legal separation, spousal support, attorneys' fees, and a determination of her property rights. Fred was personally served in Florida June 5, 1974. Six days later, June 11, 1974, Fred filed a petition in Florida for dissolution of the marriage. Verone was personally served in California.

On June 15 Fred made a special appearance under California Rule of Court 1234[1] contesting the court's jurisdiction over his person. The California court on July 15 found that Fred was a resident, even if he was not a domiciliary, of California and that his residency was a sufficient contact to allow Califor-

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1 Rule 1234 provides in part:

> In a proceeding under the Family Law Act, a respondent may serve and file a notice of motion to quash the service of summons on ground of lack of jurisdiction of the court over him . . . .

nia's long arm statute[2] to confer personal jurisdiction over him. Fred took no further action in defense of the cause and was declared in default July 22, 1974.

In the Florida case Verone never made an appearance, and the Florida court dissolved the Fehlhabers' marriage July 23, 1974. Meanwhile the California separation proceedings continued. On July 25, 1974, two days after the Florida divorce, the California court entered an order *nunc pro tunc* as of July 15 awarding Verone spousal support, attorneys' fees and costs *pendente lite* beginning August 1, 1974. The California court in a "Final Judgment of Legal Separation" on October 4 granted Verone $8,500 a month in support retroactive to August 1, $35,000 in attorneys' fees and $10,000 in court costs, while expressly reserving all issues regarding the division of property. On July 30, 1975 the California court entered a "Further Judgment" for the arrears on spousal support ($102,000), interest ($3,395), attorneys' fees and court costs ($2,615). On March 12, 1976 the California court entered the third judgment, "Further Judgment on Reserved Property Issues," awarding Fred all community and quasi-community property and awarding Verone $9,997,355.57[3] in cash to equalize the division.

With jurisdiction grounded upon diversity of citizenship, 28 U.S.C. § 1332, Verone brought an action in federal district court in Florida to enforce the three California judgments. Fred, to persuade the district court not to enforce the presumptively valid judgments, based his defense upon numerous challenges to the jurisdiction of the California court and to the validity of that court's judgments. The district court rejected

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2 Cal.Civ.Proc.Code § 410.10 (West 1973) provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

3 The California court used the figure $9,997,355.57 at one point, but at another point rounded the award off to $9,997,356.00. The district court used the former figure. Neither party raises any question concerning this nominal discrepancy.

all of Fred's challenges and, considering itself bound by the full faith and credit clause of the U.S. Constitution, granted summary judgment for Verone and entered judgment in her favor for $417,500 unpaid support from August 1, 1974; $45,000 unpaid suit costs and attorneys' fees; and $12,114,991.41, consisting of the unpaid cash award of $9,997,355.57 plus interest thereon of $2,081,390.09, and the unpaid attorneys' fees and costs of $30,000 plus interest thereon of $6,245.75.

On appeal Fred presents numerous defects in the California proceeding as grounds for not enforcing the California judgments. We reject the defects asserted with respect to the judgments of support payments and attorneys' fees and costs, and interest thereon, and therefore affirm the district court's awards based on these matters. We reverse the award of $9,997,355.57 plus interest granted pursuant to the third California judgment because we hold that California court lacked power to enter this judgment.

II.

The full faith and credit clause of the United States Constitution[4] and 28 U.S.C. § 1738[5] generally require enforcement of a sister state court's judgments. We discuss first the principles under which one state court[6] may nevertheless deny effect to a

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4 U.S. Const. art. IV, § 1, provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be provided, and the Effect thereof.

5 28 U.S.C. § 1738 provides in part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

6 This is a diversity action.

prior foreign court's judgments based on the lack of jurisdiction in the original court. Justice Frankfurter's opinion for the Court in *Williams v. North Carolina*, 325 U.S. 226, 229, 65 S.Ct. 1092, 1094, 89 L.Ed. 1577 (1945), outlines a two-stage analysis. First, the full faith and credit clause does not take effect if the original court lacked personal or subject matter jurisdiction. *Id.* at 229, 65 S.Ct. at 1094. But a collateral examination of possible jurisdictional defects cannot be made, according to federal principles of res judicata, if these issues were litigated or could have been litigated in the original proceeding. *See Davis v. Davis*, 305 U.S. 32, 43, 59 S.Ct. 3, 7, 83 L.Ed. 26 (1938). At the second stage of analysis, assuming the full faith and credit clause does come into play, a state court is required to give a prior sister state court's judgment only "the same credit, validity, and effect . . . which it had in the state where it was pronounced." *Williams, supra* 325 U.S. at 228, 65 S.Ct. at 1094. Therefore, if the original state would allow collateral attack of its judgment for lack of jurisdiction, a collateral attack may be made in a proceeding in another state.

Fred contends that the California court lacked subject matter jurisdiction to enter the three judgments sought to be enforced in the district court below. The district court ruled that because this issue could have been presented to the California court, Fred is barred by principles of res judicata from collaterally attacking the California judgments on this ground. We discuss this ruling in the context of each of the two stages of full faith and credit analysis.

At the first stage, where federal principles of res judicata apply, if Fred were not served with process and did not appear in the California court, then he would not have had an opportunity to contest that court's subject matter jurisdiction and could therefore raise the issue here in a collateral attack. *Williams v. North Carolina, supra.* But if Fred had been a party and had generally appeared in the California proceeding, his failure to raise any jurisdictional issues would preclude his raising such issues in a collateral attack. *Davis v. Davis, supra.*

This case falls between these two extremes. Fred was a party to the California proceedings. He was served with process, he contested this service, but the matter was decided against him.[7] Fred did not make a general appearance but only a special appearance to contest personal jurisdiction, as California procedure allows. Cal.Civ.Proc.Code § 418.10; Cal. Family Law Rule 1234. Moreover, after this special appearance Fred no longer participated in the proceedings and was subsequently declared in default.

Fred contends that despite his being a party a general appearance, as opposed to a special appearance, is required before he is to be considered to have had an opportunity to raise subject matter jurisdiction defects sufficient to preclude collateral attack. He further contends that once a default order was entered he was precluded from participating in the California proceedings.

We need not decide the merit of these contentions, for we find that the second stage of full faith and credit analysis allows collateral attack of the California judgments. The full faith and credit clause requires only so much respect of a foreign judgment as the forum state would give the judgment. In California, under certain circumstances judgments are subject to collateral attack for lack of subject matter jurisdiction despite the fact that the party now attacking the judgment was a party below or fully participated in the proceedings. One circumstance occurs where the jurisdictional defect appears affirmatively in the record:

> To be attackable collaterally for lack of jurisdiction the order must be void on its face and it is not void on its face unless the record affirmatively shows that the court was without jurisdiction to make the order. *Hogan v. Superior Court,* 74 Cal.App. 704, 241 P. 584. If the record discloses that the court had no jurisdiction to make the order of appointment, then it is void and can be attacked at any

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7 Fred no longer questions the propriety of the California court's exercise of personal jurisdiction over him.

> time . . . or anywhere, directly or collaterally whenever it presents itself, either by parties or strangers.

Texas Co. v. Bank of America Nat. Trust & Sav. Ass'n, 5 Cal.2d 35, 53 P.2d 127, 130-31 (1935).[8] This rule does not allow a reopening of factual questions upon which jurisdiction turns that were determined by the original court, nor does it allow the taking of extrinsic evidence to prove lack of jurisdiction. *Estate of Estrem*, 16 Cal.2d 563, 107 P.2d 36 (1940). The jurisdictional defects discussed in the following section meet these requirements, and so they may be used in collateral attack to defeat enforcement of the California judgments.[9]

In summary, we need not decide whether federal principles of res judicata bar an examination of the California court's jurisdiction, because California law allows such an examination.[10]

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8 We emphasize in particular two portions of this quotation. Allowing attack by *parties* denotes the rule in California that a prior opportunity to raise the jurisdictional defect does not foreclose subsequent attack. *See Huff v. Mendoza*, 109 Cal.App.3d 677, 680, 167 Cal.Rptr. 348 (1980) (holding that an independent suit in equity may be brought to set aside a default judgment even though the plaintiff could have moved to set aside the judgment on the same grounds during the proceedings). Allowing *direct* attack at any time means that Fred could, if he chose, make a motion in California for relief from the judgment or bring an independent suit in equity to set aside the judgment. *See, e.g., Kass v. Young*, 67 Cal.App.3d 100, 136 Cal.Rptr. 469 (1977) (setting aside a default because the record showed that the plaintiff class had not been certified); *cf., Craft v. Craft*, 49 Cal.2d 189, 316 P.2d 345, 346 (1957) (granting relief from alimony award rendered in default because record disclosed that wife had agreed with husband before suit not to seek alimony).

9 *See* text and notes at notes 19-20 *infra*.

10 The dissent is inapposite because it addresses only federal law. In the California decision cited, *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957), the issue was whether an Illinois separate maintenance judgment was to be enforced in California. In holding that a prior Nevada divorce could not now be considered but should have been asserted in the Illinois forum, the California court relied on federal authority. Even if *Lewis* were read as addressed to state law, it would not

III.

We look to California law to determine if the California court had subject matter jurisdiction to enter its judgments.[11] See discussion and citations in *Farley v. Farley*, 227 Cal.App.2d 1, 38 Cal.Rptr. 357, 361-62, *cert. denied*, 379 U.S. 945, 85 S.Ct. 438, 13 L.Ed.2d 543 (1964). The three judgments were rendered in an action for legal separation brought by Verone pursuant to the California Family Law Act, Cal.Civil Code § 4000 *et seq.* Before the California court rendered any judgment, however, the July 23, 1974 Florida divorce decree dissolved the Fehlhabers' marriage.[12] In California "prior dissolution of the marriage is . . . a complete defense to . . . an action [for legal separation]." *DeYoung v. DeYoung*, 27 Cal.2d 521, 527, 165 P.2d 457, 460 (1946) (Schauer, J., concurring); *Hudson v. Hudson*, 52 Cal.2d 735, 344 P.2d 295, 299-300 (1959); *Patterson v. Patterson*, 82 Cal.App.2d 838, 187 P.2d 113, 115 (1948). This requirement of a marriage is a "jurisdictional prerequisite." *Colbert v. Colbert*, 28 Cal.2d 276, 169 P.2d 633, 635 (1946); *Knox v. Knox*, 88 Cal.App.2d 666, 199 P.2d 766, 773 (1948). Fred argues, therefore, that the California court was without subject matter jurisdiction to enter any of its orders, and that because the Florida decree appears in the record of the California proceeding, enforcement of the California judgments should be barred.

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contradict our conclusion for the issue in *Lewis* would have been Illinois law. Thus, in no event does *Lewis* express California law.

11 Unfortunately California does not have a procedure by which this court can certify to the courts of California the dispositive questions of law that must be answered in this case.

12 On July 25, 1974 the California court did enter an order *nunc pro tunc* as of July 1, 1974 awarding temporary alimony and costs and attorneys' fees. This attempt at retroactivity appears to be ineffectual, for the Family Law Code authorizes *nunc pro tunc* orders only in limited situations, Cal.Civil Code §§ 4513, 4515 (West 1970 & Supp.1981), of which this is not one. We need not conclusively decide this issue, however, since under our holding this order is effective regardless of its date.

This argument reasons too broadly. Ordinarily in California support and property rights incident to a marriage are determined in a proceeding brought pursuant to the Family Law Act for dissolution of marriage or for legal separation. *See* Cal.Civ.Code § 4800 (property rights), and § 4801 (support rights).[13] The rationale for the rule that marriage is a prerequisite to such actions is that a prior divorce moots the prayer for legal separation or divorce. *Hudson,* 344 P.2d at 299 (divorce). Once the marriage has been dissolved in another proceeding, then there is no longer any statutory basis for deciding property and support rights, for there is no statutory provision authorizing a separate suit to adjudicate these financial matters in isolation from adjudication of the status of the marital res. *See id.* This does not mean, however, that a nonstatutory action may not be pursued to determine these matters separately. Under the concept of "divisible divorce", a prior divorce does not automatically adjudicate property and support rights; instead, these financial matters are litigable in an equitable proceeding separate from that in which the status of the "marital res" is adjudicated. *Hudson, supra* (alimony); *DeGodey v. DeGodey,* 39 Cal. 157 (1870) (property division); Comment, Post-Dissolution Suits to Divide Community Property: A Proposal for Legislative Action, 10 Pac.L.J. 825, (1979).

The question we must face, then, is whether the California action was a nonstatutory proceeding in equity, separate from

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13 Cal.Civil Code § 4800(a):

> [T]he court shall, either in its interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties . . . equally.

Cal.Civil Code § 4801(a):

> In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for such period of time, as the court may deem just and reasonable.

The prior statute was similar. *See* Cal.Civ.Code §§ 139, 146.

the Florida proceeding that dissolved the marriage, to adjudicate support and property rights. We conclude that it was, despite its nominal title as a legal separation action. In her initial pleading Verone requested legal separation, spousal support, attorneys' fees and costs, "that property rights be determined as provided by law," and "that the court . . . render such judgments and make such . . . other orders as are appropriate." Thus, Verone did not simply make a request for legal separation but made a broad prayer for a variety of forms of relief. *Hudson, supra,* is an analogous case. There the wife sued for divorce and for alimony after her husband had obtained a divorce in Idaho. The court stated that the "prayer for divorce is moot" but that the "prayer for alimony remains to be adjudicated." 344 P.2d at 299. Similarly, here Verone's prayer for separation was mooted, but, following the precedent in *Hudson*, her request for other forms of relief survives as an equitable, nonstatutory proceeding. *Id.*

There is no cognizable irregularity, then, in the California court's award of support payments and attorneys' fees and costs; the district court's judgment is therefore affirmed with respect to these matters. This does not end our inquiry, however, because Fred contends that the property division granted by the third judgment was improper. In California, property considered to be community property or quasi-community property (the "marital property" or "marital estate") is divided equally between the spouses in the event of a divorce. Cal.Civ.Code § 4800(a). To accomplish this division the California court determined the net value of the marital estate,[14] awarded all of the assets to Fred, and gave Verone a monetary judgment of close to $10 million as an offset.[15] This offset

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14 Fred defaulted and so did not respond to Verone's requests for admissions as to the value of the marital estate. The California court's method of proof of value was to take these requests for admissions as admitted. We are not required to decide the propriety of this procedure.

15 The order of the court stated:

> The Court finds that due to respondent's failure to respond, all of the facts alleged in petitioner's request for admissions . . . are true,

procedure is authorized by Cal.Civil Code § 4800(b)(1) "where economic circumstances warrant." Fred contends that the property division was beyond the power of the California court because the offset of the entire marital estate for a monetary judgment of one half of the estate's value is not authorized. We agree, although for reasons somewhat different from those advanced by appellant.[16] We hold that under California law a court acting in its nonstatutory jurisdiction to determine property rights separate from adjudication of the marital res may not employ an offset of assets as a method for dividing community and quasi-community property.

The case of *Buller v. Buller*, 62 Cal. App.2d 687, 145 P.2d 649 (1943) is on point. In *Buller* the wife, having obtained a divorce in a prior action on the ground of habitual intemperance, brought a separate action to determine her interest in the community property. The marital estate consisted of cattle, crops, and a plot of land. The husband had conveyed the cattle and crops, however, and so the trial court awarded the wife the plot of land as her share of the community property. On appeal the court reversed, holding that the trial court only had the power to order an equal division of each asset. The court reasoned that where a prior divorce does not adjudicate property rights:

> "[a]n action equitable in character . . . may be brought by either party to settle the affairs of the late community and divide its property. *The court in this action will not, however, possess those special powers as to division that are sometimes conferred on courts in divorce actions to depart from a mathematically equal division.*" . . . In

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and that the community property has the value stated in Paragraph 23 thereof [$19,994,711.00]. It is therefore ordered . . . that all of said community property is awarded to respondent. To equalize the division of community property, petitioner is awarded judgment against respondent in the amount of $9,997,356.00.

16 Fred points to the lack of findings of an economic necessity for the offset.

> view of the foregoing, it appears to have been error on the part of the trial court to award to plaintiff any more than an undivided one-half interest in the lot in question.

145 P.2d at 652 (emphasis in the original); quoting McKay on the Law of Community Property, 2d ed., page 864).

The reasoning of *Buller* is that because the jurisdiction for a separate action for property division is a nonstatutory one it follows that the special statutory power of offset is not available under such jurisdiction. *Buller* was decided before the enactment of the present Family Law Act, Cal.Civ.Code § 4000, *et seq.*, however, so we must inquire whether its premise is still accurate before we embrace its conclusion.

There is no indication in the Family Law Act that a separate action for property division is now a statutory action. California Civil Code § 4800 enumerates the instances where marital property may be divided: "in [the court's] interlocutory judgment of dissolution of the marriage, in its judgment decreeing the legal separation of the parties, or at a later time if it expressly reserves jurisdiction." Although this section allows the division of property to be done separately from the adjudication of the marital res under certain conditions, none of those conditions is met here. First, § 4800 authorizes separate division of marital property only at a time later than the California court's judgment of dissolution or legal separation. Here, the judgment of legal separation by the California court was mooted by the prior Florida divorce; therefore, the procedural sequence prerequisite to a statutory separate property division never occurred. Second, § 4800 authorizes separate property division only where the court adjudicating the marital res "expressly reserves jurisdiction" to do so. Although the California court made such a reservation of jurisdiction, this too was after the Florida divorce and therefore outside of the court's dissolution or legal separation jurisdiction. Thus, the California court could not have been acting in its statutory "reserved jurisdiction" capacity when it made the property division.

A second possible statutory source for the California court's power to divide the Fehlhabers' marital property is Cal.Civ.Code § 4351, which provides plenary jurisdiction over all aspects of the marriage:

> In proceedings under this [Act], the superior court has jurisdiction to inquire into and render such judgments and make such orders as are appropriate concerning the status of the marriage, [child support and child custody], the support of either party, the settlement of the property rights of the parties, and the award of attorneys' fees and costs.

Section 4351 merely states that property rights may be settled in any action that is authorized by the Act. It begs the question, then, to contend that this provision itself authorizes an independent action to determine property rights. Instead, § 4351 is consistent with the conclusion that jurisdiction to settle financial matters is only ancillary to a legal separation action brought under the Act, and that absent a jurisdictional basis for the legal separation action, there is no foundation for § 4351's ancillary jurisdiction.

Finally, in the several cases brought for separate determination of property rights since the enactment of the Family Law Act, in none is it intimated that the court's jurisdiction is a statutory one. *See, e.g., Sangiolo v. Sangiolo*, 87 Cal.App.3d 511, 151 Cal.Rptr. 27 (1978); *Bridges v. Bridges*, 82 Cal.App.3d 976, 147 Cal.Rptr. 471 (1978); *Lewis v. Superior Court*, 77 Cal.App.3d 844, 144 Cal.Rptr. 1 (1978); *Kelley v. Kelley*, 73 Cal.App.3d 672, 141 Cal.Rptr. 33 (1977); *Irwin v. Irwin*, 69 Cal.App.3d 317, 138 Cal.Rptr. 9 (1977).

Like the statute under which *Buller* was decided, then, nowhere in the Family Law Act is a separate action for property division expressly or impliedly authorized. By contrast, separate actions for child support and child custody are allowed. Cal.Civ.Code §§ 4603, 4703. We must conclude, therefore, that in this case the property division was allowed only by the court's common law power to sit in equity over a

separate action for property division.[17] The court's powers in such an action must be determined by common law. *Buller*, as an enunciation of the common law, has not been altered by the Family Law Act.[18] Therefore the California court exceeded its powers in deviating from a strict mathematical division of the community and quasi-community assets.

Under California law the *Buller* defect in these proceedings is subject to collateral attack. The *Buller* court viewed the question as one of the "power" of the trial court to deviate from a precise division of assets. 145 P.2d at 652. Such questions of power, although they do not affect the subject matter of the court in a "fundamental sense," do state a jurisdictional defect that is subject to collateral attack. *Farley, supra*, 38 Cal.Rptr. at 360-64 (concerning method of awarding child support); *Vasquez v. Vasquez*, 109 Cal.App.2d 280, 240 P.2d 319, 320-21 (1952) (concerning unequal allocation of marital property).[19] In other words, while the California court

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17 We note that a statutory action for partition may not be brought with respect to marital property. Cal.Code of Civil Pro. § 872.210(b). This section codifies the prior precedent of *Jacquemart v. Jacquemart*, 142 Cal.App.2d 794, 299 P.2d 281 (1956),and "promotes a policy to make the family law court the sole forum for resolution of disputes relating to marital property." Legislative Committee Comment to § 872.210, *id.* (West Supp.1979).

18 In particular, the broad provisions in the standardized Family Law pleading forms, *see* Family Law Rule 1281, are not specific enough to be construed as derogating the common law. Rather, they are readily incorporated within the *Buller* doctrine. Here Verone asked that "property rights be determined as provided by law," and the law provides that only exact division of assets is available.

19 *Farley*, 38 Cal.Rptr. at 361, 362:

> The husband . . . makes a collateral attack on the Utah court's "jurisdiction" in the limited sense of the term, asserting lack of power to give the particular relief it did.
>
> . . . .
>
> Utah law, like that of California, has it that a judgment may be collaterally attacked when it discloses on its face an order in excess of jurisdiction.

Vasquez, 240 P.2d at 320:

did have jurisdiction to determine property rights, it did not have "jurisdiction . . . to act except in a particular manner, or to give certain kinds of relief." *Vasquez, supra*, 240 P.2d at 321. The offset, by exceeding the common law power of the court, "was in excess of the jurisdiction of the California court and not a mere error or irregularity in the proceeding."[20] *Id.* Second, this defect appeared on the face of the California

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A wrong decision made within the limits of the court's power is error correctable on appeal or other direct review, but a decision which oversteps the jurisdiction and power of the court is void and may be set aside directly or collaterally.

20 As discussed in part II, *supra*, the issue we face is whether the Florida district court should have considered this defect in the California proceeding in determining whether to give full faith and credit to the California judgment. We conclude that because, inter alia, the defect is of jurisdictional proportions it should have been considered despite a prior opportunity to raise it in the California court. The analysis of the dissent differs in that it views the alleged defect in the California proceeding as simply a contention that California had failed to give full faith and credit to the Florida divorce, a contention that may not be raised by way of collateral attack, evidently because it is "a mere error or irregularity in the proceeding." This misses the mark.

First, the parties do not contend that the Florida divorce was not given full faith and credit or that the divorce was invalid. Indeed, because the Florida decree only concerns the marital res and the California judgments sought to be enforced here concern only property and support rights, the California judgments in no way affect the validity of the Florida decree. Instead, the issue in dispute here is what effect the Florida divorce has on the jurisdiction of the California court. Were there grounds in the California court record to dispute the existence or validity of the Florida divorce, or had the California court actually adjudicated the Florida divorce as invalid, our analysis might differ. This is not the case, however.

Second, even assuming that the parties raise the issue of California's failure to give full faith and credit, this would not preclude Fred from making a jurisdictional argument as well. The offset defect discussed in text is more than a failure to give full faith and credit to the Florida divorce because the fact of this prior divorce, which fact is affirmatively disclosed by the record of the California proceeding, alters the state law powers of the California court in such a way that it may not grant an offset. It is this jurisdictional impact that California law gives

court's order. Because the property division was entirely in the form of an offset, *see* note 11 *supra*, the entire property division is invalid and unenforceable.[21]

The district court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.

HATCHETT, *Circuit Judge*, dissenting:

I respectfully dissent for the reasons expressed in the district court opinion as follows:

> The first question before the Court involves a challenge to the Final Judgment of Legal Separation, the Defendant arguing that the Florida decree dissolving the parties' marriage was entitled to full faith and credit in the California proceeding and that, consequently, the California court was without jurisdiction to proceed with an action for legal separation of the parties as there no longer existed a marriage upon which to ground a separation or the payment of separate maintenance. However, the record reflects unequivocably that the Defendant failed to raise the Florida decree as a defense in the California separation proceeding, and for this reason Defendant's argument must fail. The argument overlooks the fact that for the Florida decree to have been entitled to full faith and credit in the California proceeding, the Florida decree must have been raised as a defense in that cause. A party, subject to the jurisdiction of a second court, may not ignore the opportunity in the second court

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to the Florida divorce that renders it cognizable here in defense to the California judgments.

21 We do not reach the merits of appellant's other contentions, for they are all addressed only to the validity of the property division.

to raise a defense based upon a prior judgment of a sister state, and then attempt to invalidate the second court's judgments in a third action for enforcement by resurrecting the defense based upon the first court's judgment. *Morris v. Jones*, 329 U.S. 545 [67 S.Ct. 451, 91 L.Ed. 488] (1946); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 [60 S.Ct. 44, 84 L.Ed. 85] (1939); *Porter v. Wilson*, 419 F.2d 254 (9th Cir. 1969); *Southard v. Southard*, 305 F.2d 730 (5th Cir. 1962); *Helgesson v. Helgesson*, 196 F.Supp. 42 (D.Mass. 1961); and *Lewis v. Lewis*, 317 P.2d 987, 49 Cal.2d 389 (1957). See also, [Midessa] *Medissa Television Co. v. Motion Pictures for Television*, 290 F.2d 203 (5th Cir. 1961); RESTATEMENT OF JUDGMENTS § 42, Comment a (1942); and Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 *Harvard Law Review* 798 (1969). As the Court in *Morris v. Jones, supra*, stated:

> As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only one word need be said. *Roche v. McDonald* [275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365] . . . makes plain that the place to raise that defense was in the Missouri proceeding . . . . And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court, which is the final arbiter of questions arising under the Full Faith and Credit Clause . . . . In any event the Missouri judgment is res judicata to the nature and amount of petitioner's claim as against all defenses which could have been raised.

Id. [329 U.S.] at 552 [67 S.Ct. at 456].

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number 75-2274-Civ-JE

VERONE MARIN FEHLHABER,

Plaintiff,

—v.—

FRED ROBERT FEHLHABER,

Defendant.

ORDER

On January 15, 1961, Plaintiff and Defendant were married in the State of New York. On May 15, 1974, the parties separated. Litigation between them began on May 17, 1974 with the filing of Verone Fehlhaber's petition for legal separation, spousal support and division of community property in the Superior Court of Los Angeles County, California. The Defendant, Mr. Fehlhaber, appeared in the California action to contest jurisdiction over his person, and the California court held that the requisite personal jurisdiction existed. Mr. Fehlhaber did not petition for a writ of mandate from the decision denying his motion to quash[1] and he took no further

1 No "extrinsic fraud" issue is before this Court. Having failed to challenge the California court's jurisdictional determination made on the evidence there, Mr. Fehlhaber may not here collaterally attack that jurisdictional determination.

action in defense of the cause and a default was entered as to him. Within one month after the institution of the California proceeding, Mr. Fehlhaber commenced an action in Florida for dissolution of the parties' marriage. Process from the Florida action was effected upon Verone Fehlhaber in California. Verone Fehlhaber did not appear in the Florida action, and a default was entered against her. Prior to any judgments being entered in the California action, the Florida cause proceeded to final hearing and on July 23, 1974 the parties' marriage was dissolved by Florida decree. Following the Florida dissolution decree, three judgments relevant to the instant action were entered by the California court. The first, a Final Judgment of Legal Separation entered on October 4, 1974, in addition to the legal separation, provided for the payment of $8,500 per month for spousal support, and $45,000 for costs and attorneys' fees. Jurisdiction over all issues regarding division of the parties' property was expressly reserved. On July 30, 1975, a Further Judgment in the amount of $153,020.33 was entered on Verone Fehlhaber's ex parte Application for Judgment on Accrued Support, Attorneys' Fees, Costs and Interest. The third judgment, on the reserved property issues, was entered on March 12, 1976. In the March 12, 1976 judgment, Mr. Fehlhaber was awarded all community and quasi-community assets, while Verone Fehlhaber was awarded $9,947,355.57 as a cash equalization of the division of property, $50,000 as her share of community funds misappropriated by Mr. Fehlhaber, and $30,000 for costs and attorneys' fees.

With jurisdiction grounded upon diversity of citizenship, 28 U.S.C. § 1332, Plaintiff, Verone Fehlhaber, has brought the instant action seeking recognition and enforcement of the three above-mentioned California judgments. Both parties have moved for summary judgment, and it appears that there is no genuine issue as to any material fact, all disagreements between the parties arising from their respective positions on the legal issues raised by the facts. Defendant, Fred Fehlhaber, in an attempt to carry the burden of demonstrating the unenforceability of the presumptively valid judgments, has based his defense here upon numerous challenges to the jurisdiction of

the California court and to the validity of that court's judgments.

The first question before the Court involves a challenge to the Final Judgment of Legal Separation, the Defendant arguing that the Florida decree dissolving the parties' marriage was entitled to full faith and credit in the California proceeding and that, consequently, the California court was without jurisdiction to proceed with an action for legal separation of the parties as there no longer existed a marriage upon which to ground a separation or the payment of separate maintenance. However, the record reflects unequivocably that the Defendant failed to raise the Florida decree as a defense in the California separation proceeding, and for this reason Defendant's argument must fail. The argument overlooks the fact that for the Florida decree to have been entitled to full faith and credit in the California proceeding, the Florida decree must have been raised as a defense in that cause. A party, subject to the jurisdiction of a second court, may not ignore the opportunity in the second court to raise a defense based upon a prior judgment of a sister state, and then attempt to invalidate the second court's judgments in a third action for enforcement by resurrecting the defense based upon the first court's judgment.[2] *Morris* v. *Jones*, 329 U.S. 545 (1946); *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939); *Porter* v. *Wilson*, 419 F.2d 254 (9th Cir. 1969); *Southard* v. *Southard*, 305 F.2d 730 (5th Cir. 1962); *Helgesson* v. *Helgesson*, 196 F. Supp. 42 (D. Mass 1961); and *Lewis* v. *Lewis*, 317 P.2d 987, 49 Cal. 2d 389 (1957). *See also Medissa Television Co.* v. *Motion Pictures for Television*, 290 F.2d 203 (5th Cir. 1961); RESTATEMENT OF JUDGMENTS § 42, Comment a (1942); and Ginsburg,

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2 As the Defendant has failed to establish that the California court improperly denied full faith and credit to the Florida dissolution decree, it is unnecessary for the Court to consider either the question of whether a valid marriage is a jurisdictional prerequisite to a separate maintenance award in California, or the question of whether a denial of full faith and credit by the California court would be grounds for a denial by this Court of full faith and credit to the California judgments.

Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments, 82 *Harvard Law Review* 798 (1969). As the Court in *Morris* v. *Jones*, *supra*, stated:

> As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only one word need be said. Roche v. McDonald, . . . makes plain that the place to raise that defense was in the Missouri proceeding . . . . And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court, which is the final arbiter of questions arising under the Full Faith and Credit Clause . . . . In any event the Missouri judgment is res judicata to the nature and amount of petitioner's claim as against all defenses which would have been raised.

Id. at 552.

In the second argument, Defendant looks only to the Further Judgment entered on the Application for Accrued Support, Attorney's Fees, Costs and Interest. Relying upon *Griffin* v. *Griffin*, 327 U.S. 220 (1946), Defendant contends that the Judgment was entered in violation of his due process rights as he did not receive notice that the arrearages were being reduced to judgment.

In *Griffin*, the Court held that a New York judgment for accrued alimony was not entitled to full faith and credit in the District Court for District of Columbia due to the failure to provide the husband with notice that the arrearages were being reduced to judgment. Two factors appear to have weighed heavily in favor of the finding that the petitioner's due process rights have been violated. First, the parties had been involved in a series of proceedings which had spanned over a decade. In all these proceedings the husband had appeared and actively participated. Two years lapsed between the last noticed proceeding and the wife's ex parte application, and in this single instance, for reasons not stated, notice was not extended to the husband. Secondly, and most importantly, accrued alimony

was subject to retroactive modification in New York at that time, and the entry of Judgment ex parte deprived the husband of the right to assert equitable defenses to payment of the accruals.

The factual aspects of *Griffin* and the instant action are distinct. Here, Defendant was in default in the proceeding in which the ex parte application was made. Once in default, he was not entitled to notice or service of most pleadings and papers. *California Civ. Proc. Code* § 1010 and *California Civ. Code* § 4809 (West). In addition, accrued support is not subject to retroactive modification in California as it was in New York. *California Civ. Code* § 4801(a) (West). *See also In re Marriage of Wyshak*, 138 Cal. Rptr. 811, 70 Cal. App. 3d 384 (Ct. App. 1977). While these distinctions may be sufficient to render *Griffin* inapplicable to the instant action, it is unnecessary to come to a final resolution of the question as the arrearages sought to be recovered under the "Further Judgment" are equally as recoverable under the Final Judgment of Legal Separation entered by the California court on October 4, 1974. *Sistare* v. *Sistare*, 218 U.S. 1 (1909).

Following *Sistare* v. *Sistare*, *supra*, Florida recognizes and enforces judgments as to past due installments under the Full Faith and Credit Clause where the arrearages under the judgment are not subject to retroactive modification in the rendering state. *Boyer* v. *Andrews*, 196 So. 825 (1940). In Florida, a presumption exists in favor of the finality of a judgment and against any authority to modify the accrued installments. *Boyer, supra* at 828; *Fugassi* v. *Fugassi*, 332 So. 2d 695 (Fla. 4th DCA 1976); and *Miller* v. *Shulman*, 122 So. 2d 589 (Fla. 3d DCA 1960). In this instance not only has the presumption in favor of finality not been rebutted, but accrued support is not subject to retroactive modification in California. *Cal. Civ. Code* § 4801(a) (West). Under these circumstances it is not necessary to reduce past due installments to judgment prior to enforcement in Florida, and judgment for all past due installments is possible through full faith and credit recognition and enforcement of the October 4, 1974 Judgment for Legal

Separation. *Accord*, *Lewis* v. *Lewis*, 317 P.2d 987, 49 Cal. 2d 389 (1957).

Defendant's two remaining arguments are directed to the Judgment on Reserved Property Issues. As stated by the Defendant, the first issue is "whether the entry of the judgment of $9,997,355.57 by a judge pro tem of the Superior Court of the State of California was void under the Constitution and the Rules of Procedure of the State of California?" Defendant's argument stems from the fact that in California constitutional provision has been made for the performance of judicial functions by persons other than regular members of the judiciary. Article 6, § 21 of the California Constitution provides that: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." Article 6, § 22 of the California Constitution states: "The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties." A temporary judge during the period of appointment has the same judicial authority as a regularly presiding state court judge, while the authority of commissioners has been limited by the Constitution to "subordinate judicial duties." The California legislature, pursuant to the authorization in Article 6, § 22, has provided for the appointment of commissioners and has specifically delineated the "subordinate judicial functions" the commissioners may perform; in this instance the applicable statute is *California Civ. Pro. Code* § 259a.

The argument of Defendant is that the Judgment on Reserved Property Issues is void for lack of jurisdiction as the parties litigant did not stipulate to the hearing on reserved property issues before a temporary judge as required by Article 6, § 21 of the California Constitution. Absent this stipulation, Defendant contends that the presiding officer sat solely as a commissioner and that under *California Civ. Proc. Code* § 259a(6) the commissioner lacked authority and jurisdiction to enter a judgment on the reserved property issues.

On January 29, 1979, this Court entered an Order noticing the cause for hearing on the facts surrounding the proceeding before the California temporary judge. In response to the January 29, 1979 Order, Plaintiff supplemented the record with evidentiary materials establishing that Judge John R. Alexander was operating under a General Order of Assignment as a commissioner and a judge pro tem effective on March 12, 1976, the date of the hearing and entry of judgment on the reserved property issues, and that an entry had been made on a Minute Order dated March 12, 1976 reflecting that a stipulation had been entered that the commissioner hear the matter as a judge pro tempore. In the hearing before this Court on February 16, 1979, counsel for Defendant stated that Defendant was not contesting the validity of Judge Alexander's designation as a temporary judge or Mrs. Fehlhaber's stipulation that the cause be heard before a temporary judge. At this Court's hearing Defendant took the position that "[o]n stipulation of the parties litigant" should be read to require a stipulation entered into by both Mr. and Mrs. Fehlhaber, and that it was uncontested that Mr. Fehlhaber did not stipulate to the hearing of the reserved property issues before a temporary judge.

Under the California Constitution, a stipulation by the parties is required to infuse a commissioner with the authority of a temporary judge. *See People* v. *Tijerina*, 81 Cal. Rptr. 264, 268, 1 Cal. 3d 41 (1969). However, in defining "parties litigant" the Supreme Court of California has held that a party in default in a proceeding is not a party litigant within the meaning of Article 6, § 21. *Sarracino* v. *Supreme Court of Los Angeles County*, 529 P.2d 53, 13 Cal. 3d 1, 118 Cal. Rptr. 21 (1974). In *Sarracino*, a husband, not in default with respect to the pleadings, failed to respond to an Order to Show Cause or appear for the hearing on temporary support. The matter was heard before a commissioner presiding as a temporary judge upon stipulation of the wife. In responding to the husband's challenge that the temporary judge lacked jurisdiction to hear the matter due to the husband's failure to join in the stipulation, the Court stated:

> We conclude that for the purpose of defining 'party litigant' (Const., art. VI, § 21), petitioner's default with respect to the applications for temporary support is indistinguishable from that of a defendant whose default is entered in a civil action following his failure to plead within the required time. Accordingly, petitioner was not a party litigant, and the stipulations executed by the applicants for temporary support were sufficient to empower the commissioner to act as a temporary judge.

Id. 118 Cal. Rptr. 28. In this instance, Defendant not only failed to respond to or appear for hearing on the reserved property issues, of which he had notice, he failed to respond to any matter following the California court's denial of his motion to quash, and a general default had been entered against him for failure to plead. Consequently, it appears that at the time of hearing before the temporary judge Defendant was not a "party litigant" as that term has been defined by the Supreme Court of California, and that his joinder in the stipulation was not required under Article 6, § 21 of the California Constitution. *See also Barfield* v. *Superior Court*, 31 Cal. Rptr. 30, 216 Cal. App. 3d 476 (Ct. App. 1963).

Therefore, the appointment of Commissioner Alexander as a temporary judge upon stipulation, and Mrs. Fehlhaber's stipulation that he so preside over the reserved property issues, met the requirements of Article 6, § 21 of the California Constitution. Accordingly, Judge Alexander validly served as a temporary judge with jurisdiction to enter the Judgment on Reserved Property Issues.

Defendant's final argument, and his second attack on the Judgment on Reserved Property Issues, is directed to the method of division of the parties' property. It is Defendant's position that the Judgment was entered in violation of his due process rights as the relief granted Plaintiff exceeded that requested by her in the Petition for Legal Separation. The success of this final argument is dependent upon a finding that an award of cash to Plaintiff with all property going to Defendant exceeds a prayer for division of the parties' prop-

erty. However, a consideration of the California method for division of community property indicates that this is not the case.

In California, property must be divided equally in all cases. However, by statute the courts are vested with discretion in determining the manner of division of the property. *California Civ. Code* §§ 4800 and 4800.5 (West). § 4800.5 specifically provides that in determining the manner of division of real property the court may award the property to one party with cash compensation to the other party. While § 4800, dealing with non-real property, does not contain the specific language found in § 4800.5, subdivision (b)(1) of that section has also been interpreted as authorizing a court, upon a finding that economic circumstances warrant it, to award an asset to one party with a cash equalization to the other. *See In re Marriage of Belkot*, 145 Cal. Rptr. 602, 80 Cal. App. 3d 417 (Ct. App. 1978); *In re Marriage of Brigden*, 145 Cal. Rptr. 716, 80 Cal. App. 3d 380 (Ct. App. 1978); and *In re Marriage of Tammen*, 134 Cal. Rptr. 161, 63 Cal. App. 3d 927 (Ct. App. 1977). Consequently, it appears that upon a prayer for division of the parties' property a court is vested with the discretion to determine that the circumstances warrant an award of assets to one with cash to the other. In a situation such as this, where the California court was statutorily vested with discretion to determine the manner of division of the parties' property, this Court cannot find that due process requires an amendment to the pleadings, with notice to the respondent, prior to the court's exercise of that discretion.[3] It can only be concluded that upon notice of the petition and the prayer for division of the property, the defendant bore the burden of apprising himself of the nature of the scope of the relief that could be accorded under the prayer. To hold otherwise would be for this Court to decide that Plaintiff in California was required to amend her

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3 Whether the California court's method of dividing the Fehlhabers' property may have constituted an abuse of its statutorily vested discretion is not, of course, before this Court.

pleadings to put Defendant on notice that the California court might decide to exercise its discretion in determining the manner of division of the parties' property.

In that the facts underlying the case are not in dispute and as the legal arguments challenging the validity of the California judgments have been determined adversely to the Defendant, the Court finds that the judgments of the California court are valid and entitled to full faith and credit recognition and enforcement by this Court, and that Plaintiff is entitled to summary judgment as a matter of law.

This trial court does not have the authority to unravel the web spun by these parties. Whether the California court should have determined that it had jurisdiction is not the question here. It did, and its determination was not reviewed. The present situation appears to be this: the parties are divorced and the subject property has been divided. Recognizing that this is a diversity matter and that this is a "Florida Court," a trial court cannot reconcile the time differential between the date of the Florida divorce decree and the subsequently entered California judgments. Any effort to make such reconciliation could only be made by a court with supervisory powers over both state courts. The Full Faith and Credit Clause of the United States Constitution directs this Court to honor and enforce the valid California judgments sought here to be enforced.

Accordingly, upon a full consideration of the record in this cause, and following oral argument of counsel, it is

ORDERED and ADJUDGED as follows:

1. Defendant's motion for summary judgment is denied.

2. Plaintiff's motion for summary judgment is granted as to Count II of the Complaint and the "Supplemental" Complaint.

As the relief requested under Count II of the Complaint, recognition and enforcement of the Final Judgment of Legal Separation, encompasses the relief prayed for in Count I of the Complaint, recognition and enforcement of the July 30, 1975

Further Judgment, the Court declines to enforce the July 30, 1975 Further Judgment as its enforcement is unnecessary to final adjudication of this cause.

Further, the Court declines to exercise its discretion to enforce installments that will become due in the future under the Final Judgment of Legal Separation entered by the Superior Court of Los Angeles County, California on October 4, 1974.

Final Judgment in accordance with the above will be entered.

DONE and ORDERED at Miami, Southern District of Florida, this 8th day of March, 1979.

/s/ JOE EATON
United States District Judge

cc: Woodrow M. Melvin, Jr., Esq.
Max Fink, Esq.
Mallory Horton, Esq.

APPENDIX E

California Civil Code

§ *4506. Grounds for dissolution or legal separation*

A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally:

(1) Irreconciliable differences, which have caused the irremediable breakdown of the marriage.

(2) Incurable insanity.

§ *4800. Division of community and quasi-community property*

Time of division; equality. The court shall, either (a) in its interlocutory judgment decreeing the dissolution of the marriage or in its judgment decreeing the legal separation of the parties, or (b) at a later time, if the division of property is in issue and it expressly reserves jurisdiction to make such a property division, divide the community property and the quasi-community property of the parties equally. The equal division provisions of this section shall not prevent the court:

(1) Where economic circumstances warrant, from awarding any asset to one party on such conditions as the court deems proper to effect a substantially equal division of the property;

(2) By way of an additional award or offset against existing property from awarding from a party's share any sum the court determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party.

* * *

§ *4803. Quasi-community property*

As used in this part, "quasi-community property" means all personal property wherever situated and all real property situated in this state heretofore or hereafter acquired as follows:

(a) By either spouse while domiciled elsewhere which would have been community property had the spouse acquiring the property been domiciled in this state at the time of its acquisition.

(b) In exchange for real or personal property, wherever situated, acquired other than by gift, devise, bequest or descent by either spouse during the marriage while domiciled elsewhere.

For the purposes of this section, personal property does not include and real property does include leasehold interests in real property.

California Code of Civil Procedure

§ *580. Relief granted plaintiff; restriction on default; scope in contested cases*

The relief to be awarded to the plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

California Rules of Court

Rule 1234. Motion to Quash Summons

In a proceeding under the Family Law Act, a respondent may serve and file a notice of motion to quash the service of summons upon the ground of lack of jurisdiction of the court over him or a notice of the filing of a petition for writ of mandate under the circumstances and in the manner provided by Section 418.10 of the Code of Civil Procedure.

82-1883

NO. 83-

in the Supreme Court of the United States

October Term, 1982

ROBERT F. FEHLHABER, as Personal Representative of Fred Robert Fehlhaber, deceased,

Petitioner,

vs.

VERONE MARIN FEHLHABER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 83-

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vs.

VERONE MARIN FEHLHABER,

Respondent.

STATEMENT OF THE CASE

In an attempt to convince this Court to grant the Petition for Writ of Certiorari, Petitioner (hereinafter "Fred")[1] has presented a version of the "facts" colored with innuendo

[1]Fred Fehlhaber, the Defendant in the California state court proceeding and the Florida federal action, was the husband of the Respondent, Verone Fehlhaber. Fred died in 1980 during the pendency of the appeal (six years after the commencement of the California action) and Robert F. Fehlhaber, the personal representative in probate proceedings, was substituted. However, for the sake of clarity, this Brief will continue to refer to Petitioner as Fred.

and inaccurate or incomplete statements. Petitioner portrays himself as a hapless victim "caught in a mesh of procedural complexities" due to the preclusive effect given to a California default judgment awarding his ex-wife (hereinafter "Verone") a cash award equal to one-half of the value of community and quasi-community property alleged in her complaint. However, as stated by the Fifth Circuit:

> Fred's equitable position is not so strong as he asserts. He was given full and proper notice of the California proceedings, specially appeared to contest jurisdiction, lost on this issue, and then ignored the proceedings. He did not act in ignorance but rolled the dice and lost.

(App. at B-3.)[2]

This reply brief will provide a statement of the facts and correct some of the inaccuracies contained in the Petition. Once the full statement of facts and procedural background is before the Court, it becomes abundantly clear that this case does not warrant the exercise of discretionary jurisidiction requested by Petitioner. No novel issues of constitutional law are presented by this case nor does the Fifth Circuit's opinion conflict with decisions by the Fourth Circuit or any other circuit. Rather, the opinion is perfectly consistent with the well recognized principles of full faith and credit which bar collateral attack of all valid judments including default judgments.

Statement of the Facts.

Petitioner's characterization of the parties and the California state court proceedings contain repeated, flagrant misstatements of facts. While Petitioner begins his statement

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[2]All citations to the Appendix refer to the Appendix submitted by Petitioner and are herein abbreviated "App." The Joint Appendix submitted to the Court of Appeals is designated as "Jt.App."

of facts with an uncontested statement, to-wit, that the parties were married in New York in 1961, he quickly deviates from the actual set of circumstances as found by the California court and makes a de novo argument of "facts" notwithstanding the state court's contrary holdings.

Respondent, Verone, instituted proceedings in the California state court for legal separation, spousal support, attorney fees, costs and determination of property rights on May 17, 1974. Fred was personally served with process and appeared specially to contest jurisdiction, alleging that he was a resident of Florida, not of California. (Jt.App. at 21.) Both Fred and Verone presented evidence on the issue of residence and jurisdiction in the California proceeding.[3]

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[3]Verone's evidence showed that until 1961 she was a resident of California. During that year, Verone married Fred in New York. In the year 1968, Verone and Fred moved to California. While in California, they arranged for the sale of their New York home, which was concluded in 1969. From 1968 to their separation, the parties spent most of their time in California. (App. at A-2.) Their move to California was motivated by the fact that Fred suffered from severe emphysema and the humidity conditions on the east coast made his condition only worse. (*Contra*, Jt.App. at 24.) Specific evidence of Fred's contact with California included the fact that Fred instituted litigation in California courts alleging his residency in California (Jt.App. at 19), maintained bank accounts (the California court finding that Fred had absconded with $100,000 from one California bank account, Jt.App. at 132) and memberships in country clubs and other social clubs in California, and transacted business in California. Fred and Verone retained two year-round servants in California, had two automobiles in California and their personal physicians were in California. For the most part, their friends were in California. Verone also submitted evidence that Fred had no business interests in Florida, although he directed some of the activities of Fehlhaber Corporation, a New York operation, from California and elsewhere.

Verone also presented evidence that in April, 1974, after their winter in Florida, Fred told Verone to return to California, and that he would meet her there later. After Plaintiff returned to California, Fred informed her over the telephone that he never wanted to see her again. Because of Fred's statements, Verone filed an action for legal separation on May 17, 1974, truthfully stating that the parties were California residents.

(Continued on Page 4)

On July 15, 1974, the California court, after considering extensive declarations and documentation, and despite Fred's intensive arguments,[4] denied his motion to quash service and held that California had jurisdiction because the parties were residents of California. (Jt.App. at 58.) The court determined that it was not necessary to and did not rule on the issue of whether Fred was also a domiciliary.[5]

(Footnote 3 Continued)

Certain of these assertions by Verone do not appear of record in the federal action though Fred's responses to each of the assertions appear at Jt.App. pages 23-28 and 33-57. Fred contested Verone's version of the facts but the California trial court clearly believed Verone's evidence to be more credible and convincing.

[4]*See*, Jt.App. 23-28, 33-57 containing Fred's version of the facts regarding residency. In the Petition for Writ of Certiorari, Fred's version is presented as "fact" and not as argument notwithstanding the prior adjudication rejecting his contentions. In contrast, Respondent has attempted to identify for the Court matters which are disputed and which cannot be deemed to be "facts" *per se*.

[5]*See* App. at A-26, n.25 and accompanying text: "This issue [whether Fred and Verone were domiciled in California] was disputed by the parties in the California Court when Fred made a special appearance to quash summons but was never adjudicated. *The court ruled that Fred was a resident* and that this was sufficient under California's long arm statute, even in matrimonial cases. *No ruling was made whether Fred was a domiciliary.*" (emphasis supplied.) Following the holding that the Court did have jurisdiction and Fred's default, Fred never challenged the holding that residence alone was sufficient to exercise jurisdiction and in fact Fred no longer contests the propriety of the California court's exercise of personal jurisdiction over him. (App. at C-6.) Moreover, under California's community law, residence and domicile are synonymous. *Cooper v. Cooper*, 269 Cal.App. 2d 6, 74 Cal. Rptr. 439 (1969). See also California Civil Code §5002 (maintenance of a residency in California, although departed from the state, is prima facie evidence that the person was domiciled in California). Thus, Fred's continued contention that the Court specifically held he was not a domiciliary is inaccurate and in any event is of no consequence in light of subsequent events.

Thus, Petitioner's statement that the parties "resided together in Florida from 1967 until April 1974, when respondent left Fred and went to California" is simply an incorrect, self-serving argument, contrary to the conclusions reached by the California court. Fred did not take an appeal from that California determination but instead simply ignored or evaded all subsequent California proceedings. Having lost on the jurisdictional issue, Fred apparently felt that he had nothing further to gain inasmuch as California law requires that the court make an equal distribution of assets regardless of fault.[6] However, Fred received timely notice in each instance of all subsequent proceedings.[7]

Six days after being served with the California Summons and Process, Fred filed for divorce in the State of Florida. (Jt.App. at 9.) Verone immediately obtained and served upon Fred a restraining order against Fred which prohibited him from prosecuting the Florida action. (Jt.App. at 59-60.)

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[6]Fred's choice to take no further part in the California proceeding, once California determined it had jurisdiction, was arguably only because he had nothing to gain by further appearances and contest. Since the court determined that the parties were residents of the state, Fred could not have prevented a division of community and quasi-community assets. Fred may also have feared contempt citations from the California court for his violation of the California court's restraining order relative to his Florida proceeding and for his willful failure to provide support to Verone. Furthermore, Fred had previously removed all tangible and intangible assets (except household furniture and furnishings) to New York and Florida. It is certainly conceivable that Fred feared that if he made a further appearance in California, additional proof may have been made regarding existence of additional community assets, especially in foreign banks over and above that which Verone had knowledge of and adduced in the California proceeding.

[7]Verification of all notices given to Fred and his attorneys of all California proceedings are contained in the record of the District Court and specifically in the Affidavit of R. Stephen Duke (incorrectly identified on the docket sheet, Jt.App. p.2, as Stephen P. Duke) filed on February 27, 1978 in the District Court.

Fred and his California attorney, as well as his Florida attorney, were personally served with a copy of the California restraining order. Notwithstanding such order and in defiance thereof, on July 23, 1974, Fred obtained a Florida default judgment of dissolution of marriage, which only dissolved the marital *res*. The Florida decree did not decide or rule on any of the remaining property or support matters. (Jt.App. at 62.)[8] Moreover, contrary to Fred's assertion made on page 4 of the Petition, the Florida decree was not ever made an issue by Fred in the California proceeding. (App. at C-16.)

On March 18, 1976, the California court entered its Judgment on Reserved Property Issues, determining, by its specific findings of fact and conclusions of law, and, based upon the evidence before it, that community and quasi-community property had a value of $19,000,000 and awarded Respondent one-half thereof in cash as her share of the property pursuant to California Civil Code, Sections 4800 and 4800.5. (Jt.App. at 119-132.) Although Petitioner was served and had actual notice of each order and judgment, he took no action in California to contest or appeal from the specific findings of fact, conclusions of law, orders or judgments.

It is also a fact that the Judgment on Reserved Property Issues was based upon documentation and testimony obtained from, among others, Fred's business agent (who also managed the parties' business located in New York) at his deposition concerning the parties' property and assets. Based upon testimony and evidence including financial statements circulated by Fred in order to obtain contracts in New York

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[8]Fred continues to maintain by footnote 2 of his Petition that the Florida divorce divested the California court of subject matter jurisdiction over Verone's action. The Fifth Circuit soundly rejected this argument. See App. at A-7 to A-11. *In re Marriage of Lusk*, 86 Cal.App. 3d 228, 150 Cal.Rptr. 63 (1978) and related cases cited by the Fifth Circuit's opinion make unequivocally clear that Petitioner's argument is absolutely spurious.

on large public installations, Verone prepared a Request for Admissions of Fact and served these on Fred. (Jt.App. at 86-98). The majority of the individual assets identified on the Request were listed and quoted securities and cash. Petitioner failed to respond or answer the Requests. Accordingly, pursuant to California law (Code of Civil Procedure, Sections 2033 and 2034), Respondent moved the California court to have the Request for Admissions deemed admitted as to the values and specific description of the assets. (Jt.App. at 112-116.)

As stated by the Circuit Court, "Fred was given specific notice that Verone intended to have the request for admissions deemed admitted by his failure to respond." (App. at B-3.) Petitioner's statement that as a defaulting party he was *prohibited* from responding to those requests is merely a conclusory allegation based upon a misstatement of California law.[9] His default and failure to answer did constitute an admission that all facts recited in Verone's pleading were true.

Finally, it is absoutely uncontested that at no point did Fred move to vacate, amend or otherwise contest the California judgments at the trial court level. Fred also chose not to take an appeal from that judgment or any one or more of the orders, judgments, or specific findings of fact or conclusions of law of the California court.

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[9]As will be discussed more fully in the section regarding "Method of Proof", the case relied upon by Petitioner, *Jones v. Moers*, 91 Cal.App. 65, 266 P. 821 (1928) does not stand for the proposition that a defaulting party may not file *any* pleadings. The holding in *Jones* is only that an answer or pleading filed after the date of default responding to the complaint itself is a nullity. *See, Forbes v. Cameron Petroleums, Inc.*, 83 Cal.App. 3d 256, 147 Cal. Rptr. 766 (1978). *Cf. McKim v. McKim*, 6 Cal. 3d 673, 100 Cal.Rptr. 140, 493 P.2d 868 (1972) (in a proceeding on a petition for dissolution of marriage, testimony of a defaulting respondent is *not* inadmissible).

The Proceedings Below.

Succinctly stated, the proceedings in the Southern District of Florida were simple collection proceedings initiated by Verone pursuant to 28 U.S.C. §1332 to enforce the California judgments. The District Court determined that pursuant to principles of full faith and credit Verone was entitled to summary judgment[10] for $516,750 for unpaid support together with unpaid costs and attorney's fees and for $12,114,991.41 consisting of the cash award, attorney fees, costs and interest. (App. D.)

Fred appealed from the district court judgment in favor of Verone and the Fifth Circuit at first reversed the judgment in part by a vote of two-to-one. (App. C.) That first opinion was based primarily on the Circuit Court's interpretation of a California case, *Buller v. Buller*, 62 Cal.App. 2d 687, 145 P.2d 649 (1949), which it felt allowed a collateral attack pursuant to California law. In reliance upon *Buller*, the Circuit Court initially characterized the California proceeding as non-statutory and therefore in excess of the state court's power on the misapprehension that the prior judgment in the Florida proceeding had divested the California court of jurisdiction. The dissent indicated that the Florida judgment

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[10]Fred continues to vigorously argue that entry of summary judgment was in and of itself error because Fred was not "allowed" to take discovery. This is a gross misstatement of the proceedings below. Fred did notice Verone's deposition to be taken in Miami, Florida. Verone filed a motion for a protective order based in part upon her well founded fear of physical violence. The Court ruled that Verone need not appear for deposition in Florida until one week before trial. (Jt. App. at 1, entry of June 8, 1977.) However, at no time did the trial court prohibit Fred from taking Verone's deposition in California or otherwise prohibit Fred from serving discovery upon her in terms of interrogatories, requests to produce or requests for admissions. Additionally, Verone's attorneys noticed and did take her deposition in California in the federal proceeding (Jt. App. at 2, entry of February 27, 1978) but Fred and his attorneys chose not to attend. Thus, the assertion that Fred was not "allowed" to take discovery is an absolute mischaracterization of the actual proceedings below.

was not raised as a defense in the California proceeding and that the California judgment was *res judicata*.

On petition for rehearing, the Fifth Circuit concluded that its original decision was incorrect, withdrew the opinion and substituted the opinion found in Appendix A. The Fifth Circuit upheld the District Court's order as modified.[11]

On rehearing, the Circuit Court held that under the full faith and credit provision of 28 U.S.C. §1738 it was required to determine whether the California judgment was subject to collateral attack under the "basic limitations of federal law" (due process) or under California law. The Court correctly concluded that the California court initially had properly obtained jurisdiction and that the prior Florida divorce did not divest the California court of continuing jurisdiction under the California statute. The Court also held that the California court did not exceed its power or jurisdiction in granting an entire cash offset and that the cash award was not subject to collateral attack; that the method of proof was not subject to collateral attack; and that the issue of jurisdiction over alleged quasi-community property was not properly preserved for appeal inasmuch as Fred's oblique reference to a purported constitutional challenge was abandoned and never briefed or argued below. Each of these holdings was thoroughly explained by the Court of Appeals and will be discussed more fully, *infra*.

In short, the Court recognized the vital purpose underlying the principles of full faith and credit and *res judicata* that

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[11]The Court limited the amount of the property judgment to cash in an amount equal to $7,500,000 or one-half of the largest amount pleaded in the Complaint (or "Petition" as it is labeled in California). This cured any arguable error as alleged by Fred that the relief granted exceeded the prayer for relief. *See Becker v. S.P.V. Construction Co., Inc.*, 27 Cal. 3d 489, 165 Cal.Rptr. 825, 828 (1980) (discussed *infra*). Respondent does not wish to take issue with that determination by the Fifth Circuit.

rulings must be given full recognition and finality to avoid repetitive burdensome litigation. Fred, by refusing to participate in California proceedings or to appeal from any facet thereof, was deemed to have lost the right to now, many years later, challenge the propriety of the judgment by collateral attack.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The Court of Appeals Correctly Applied the Principles of Due Process and Full Faith and Credit in Rejecting Each of the Three Purported Errors in the California Proceeding as a Basis for Collateral Attack

Petitioner asserts that the California judgment should not be accorded full faith and credit because it lacks due process of law. However, Petitioner totally fails to support this contention. In fact, his brief recognizes that the Court of Appeals applied the notice standards of due process, but then states that his due process rights required more. The truth is, Fred simply "rolled the dice and lost." He ignored the California proceedings after he lost on the jurisdictional issues. Thereafter, he received proper and actual notice of all subsequent proceedings. He cannot demonstrate any grounds for denying full faith and credit to the California judgments under due process standards.

Rather than discussing relevant cases in asserting due process violations, Petitioner relies on the Fourth Circuit opinion in *Compton v. Alton Steamship Company*, 608 F.2d 96 (4th Cir. 1979), which he wrongly tells this Court involved a collateral attack on a default judgment. The facts of the instant case and the *Compton* decision are completely distinct. In reality, there was no collateral attack in *Compton*. A

direct appeal was involved. Thus, *Compton* provides no support for Petitioner's contention that due process requires an analysis on the merits of the California judgment under a "fundamental fairness and considerations of justice" component of due process considerations.[12]

The cases which *do* discuss the due process requirements inherently limiting application of full faith and credit do not consider the issue of fundamental fairness from a substantive approach but limit the examination of the underlying judgment to a procedural due process analysis. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 2d 262 (1982) and *Underwriters National Assurance Company v. North Carolina Life and Accident*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed. 2d 558 (1982) (discussed further herein).

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[12]In *Compton*, a seaman brought an action in the Federal District Court for the Eastern District of Virginia, claiming unpaid wages against the defendant company. After defendant failed to appear, a default judgment was entered in favor of the plaintiff. Defendant "was shocked into action" by the amount of default and, *ten days* after receiving notice of the judgment, filed a motion to set it aside under Federal Rules of Civil Procedure, Rule 60, claiming mistake, inadvertence, etc. This motion was denied, and defendant filed a direct appeal to the Fourth Circuit. Accordingly, no collateral attack was involved. The Fourth Circuit reversed the denial of the motion to vacate and in fact vacated the judgment under Federal Rule of Civil Procedure 60(b).

The *Compton* decision did not involve a state court judgment wherein the defendant failed to take any action by motion or appeal or otherwise as in the instant case. In the present case, Fred appeared in the California proceeding to contest jurisdiction in the California courts and lost. He could have moved to vacate the judgments under California Code of Civil Procedure Section 473 but did not do so. Nor did he appeal the judgment. It was not until Respondent filed her collection proceedings in the Federal District Court of Florida that Petitioner first attempted to contest the California judgment and then only by an improper collateral attack. The Federal District Court rejected his attempted collateral attack and the Fifth Circuit Court of Appeals affirmed, holding that there were no due process violations, and that the California judgment was properly entitled to full faith and credit.

As recognized by the Appellate Court, full faith and credit can be approached analytically as comprising two separate concepts. First, full faith and credit requires only that the judgment entered by a state court be given the amount of recognition that the state courts in the rendering state would give the judgment. This is not a part of any constitutional due process analysis but a pragmatic definitional aspect of the "credit due" a foreign judgment.[13] Thus, if the default judgment herein was subject to collateral attack in California it would be subject to collateral attack in the Florida federal proceeding. For the reasons set forth herein

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[13]The Appellate Court raised the question whether consideration of this first factor has in essence been subsumed into the analysis of the Due Process Clause of the Constitution. However, *Kremer, supra*, explicitly recognized that a federal court must consider the state's own rules to determine the preclusive effect due a judgment to qualify for the full faith and credit guaranteed by federal law:

> Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full-faith-and-credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. *Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken. M'Elmoyle v. Cohen*, 13 Pet. 312, 326, 10 L.Ed. 177 (1839); *Mills v. Duryee*, 7 Cr. 481, 485, 3 L.Ed. 411 (1813). As we recently noted in *Allen v. McCurry, supra*, "though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts[,] *Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.*" 449 U.S., at 96, 101 S.Ct., at 416.

(Continued on Page 13)

and in the opinion contained in Appendix A, the Court found that the purported "errors" or "deficiencies" raised by Petitioner were not of a type which California courts would view as appropriate grounds for collateral attack.

The second level of analysis under both statutory and constitutional full faith and credit is the well recognized concept that federal principles of due process limit applicability of full faith and credit. Thus, as correctly stated by Petitioner, if a judgment is entered in violation of due process it is void and is subject to collateral attack. However, Petitioner gives an overly broad reading to the due process requirements not justified by the opinions of this Court.[14]

The Appellate Court, after a very methodical analysis of this Court's most recent discussions of full faith and credit, concluded that the due process limitations on recognition of judgments is very narrow with the principle focus being

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(Footnote 13 Continued)

Id. at 102 S.Ct. 1897. Thus, whether or not considered as a subset of due process, consideration of the "credit" owed to a foreign judgment pursuant to §1738 clearly requires a federal court to examine the preclusive effect California would give the default judgment. As more fully explained, *infra*, California would consider this judgment as *res judicata* in any collateral proceeding.

[14]In essence, Petitioner attempts to assert lack of subject matter jurisdiction because of the purported "irregularities" in the type of evidence upon which the California court relied, the nature of relief granted Verone and because of alleged unconstitutionality of the California quasi-community property statute as applied to Fred. None of the three "errors" go to the actual issue of subject matter jurisdiction. "Subject matter jurisdiction" means only that a court must have "jurisdiction or power to deal with the *class* of cases in which it renders judgment." 7 MOORE'S FEDERAL PRACTICE ¶60.25[2], at 302 (2d ed. 1982). A court's determination that it does in fact have jurisdiction over the subject matter, assuming personal jurisdiction exists, is not subject to collateral attack. *Id.* at 306. This is true even if the judgment in issue is a judgment by default. *Id.* at 308.

on *jurisdiction* over the person, full *notice* of the litigation, and an *opportunity* to participate in the proceedings.

The following pertinent portions of *Kremer* amply support the Circuit Court's logic:

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue. . . . "[R]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the *procedures followed* in the prior litigation." *Montana v. United States*, 440 U.S., at 164 n.11, 99 S.Ct., at 979 n.11. Cf. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973).
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> The State must, however, satisfy the applicable requirements of the Due Process Clause. A state may not grant preclusive effect in its own courts to a constitutionally infirm judgment and other state and federal courts are not required to accord full-faith-and-credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the state from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.[24]
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> [[24]The Court's decisions enforcing the Full-Faith-and-Credit Clause of the Constitution, Article IV, § 1, also suggest that what a full and fair opportunity to litigate entails is the *procedural requirements of due process. Sherrer v. Sherrer*, 334 U.S., at 348, 68 S.Ct., at 1089 (*"there is nothing in the*

> *concept of due process which demands that a defendant be afforded a second opportunity to litigate. . . the existence of jurisdictional facts"*). Section 1738 was enacted to implement the Full-Faith-and-Credit Clause, . . . and specifically to insure that federal courts, not included within the constitutional provision, would be bound by state judgments. *Davis v. Davis*, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26 (1938) ("The Act extended the rule of the Constitution to all Courts, federal as well as state"). It is therefore reasonable that § 1738 be subject to no more restriction than the Full-Faith-and-Credit Clause.]

Kremer, supra, 102 S.Ct. at 1897-98 (certain citations omitted) (emphasis supplied).

Similarly, *Underwriters National Assurance Company v. North Carolina Life and Accident*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982), supports the Fifth Circuit's opinion that the determination by the California court of jurisdiction and an independent determination by the Fifth Circuit that Fred in fact had notice and an opportunity to litigate compels the conclusion that the California judgment be given preclusive effect:

> This Court has long recognized that "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." . . . Any doubt about this proposition was definitely laid to rest in *Durfee v. Duke, Supra*, 375 U.S. at 111, 84 S.Ct. at 245, where this Court held that "a judgment is entitled to full faith and credit—*even as to questions of jurisdiction*— when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.[13]

> [[13]The need for finality within our federal system, . . . applies with equal force to questions of jurisdiction. As this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172, 50 S.Ct. 134, 137, 83 L.Ed. 104 (1938), "[a]fter a party has his day in court, with *opportunity to present his evidence and his view of the law*, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."]
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> * * *
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> *A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding.* See *Sherrer v. Sherrer*, 334, U.S. 343, 352, 68 S.Ct. 1087, 1091, 92 L.Ed. 1429.

102 S.Ct. at 1366, 1368 (citations omitted) (emphasis supplied).

After being served with process in the California action, Fred specially appeared to challenge the court's jurisdiction over his person, but lost. Fred did not seek direct review of that determination, nor does he now contest this ruling. Thus, the California court's ruling is *res judicata* and cannot be revisited by a collateral attack. Clearly the California court was empowered to adjudicate this type of case and possessed subject matter jurisdiction. Additionally, it is abundantly clear that Fred had the opportunity to litigate in California each of the grounds which he now urges as error. Fred, having had notice and an opportunity to litigate the matter in a court of competent jurisdiction was not denied due process in connection with the rendition of the California judgments.

A. The California Judgment On Property Rights Was Based Upon Testimony and Evidence Properly Presented and In Any Event the Method of Proving Damages May Not Be Collaterally Attacked.

Petitioner improperly claims that the California judgment on property was error because it was "entered without any proof as to the existence, character or value of the alleged assets." This is completely untrue.[15]

In addition to Verone's testimony and the deposition of Fred's business agent, the California court also relied upon the Request for Admissions (which detailed each asset and value) to which Fred refused to respond and based its award on the value of assets identified therein. Petitioner does not cite nor can he cite any California cases holding that this would provide grounds for a collateral attack under California law. Federal principles of full faith and credit and due process likewise do not provide a basis for collateral attack because of alternate methods of proof.

The Requests for Admission were deemed admitted by Petitioner's failure to respond thereto.[16] An admission is valid evidence upon which to base a judgment. However, contrary to the facts in the instant case, even if the California court did not take any evidence to support the judgment on property, such failure would not be grounds for collateral attack under California law. Although Section 585(b) of the California Code of Civil Procedure requires proof to be taken to ascertain the amount of damages in the event of a default,[17] any judgment that does not comply with Section 585(b) only amounts to error to be cured by direct (not

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[15] *See* n.9, *supra*, and accompanying text.

[16] Petitioner's assertion that he was prohibited from doing so will be more fully discussed, *infra*.

[17] *See also* §4511 of the California Civil Code.

collateral) attack. *Baird v. Smith*, 216 Cal. 408, 14 P.2d 749, 751 (1932). *See also Gray v. Hall*, 203 Cal. 306, 313, 265 P. 246, 251 (1928); *Hamblin v. Superior Court*, 195 Cal. 364, 233 P. 337, 341 (1925).

Petitioner argues that under federal due process principles notice does not suffice in this situation because (a) Fred was prohibited from responding to the Request for Admission and (b) the award exceeded Fred's total net worth. Neither point has any factual or legal merit and cannot provide a basis for ignoring the mandate of full faith and credit.

Fred's contention that he was prohibited from filing a response to the Request for Admissions is entirely wrong. *Jones v. Moers*, 91 Cal.App. 65, 266 P. 821 (1928), cited by Petitioner, held that an answer filed after entry of default is unauthorized. *See also Forbes v. Cameron Petroleums, Inc.*, 83 Cal.App. 3d 256, 147 Cal.Rptr. 766 (1978). However, Fred fails to draw a distinction between a response to request for admissions and an answer. A response to a request for admissions is not a responsive pleading within the meaning of *Jones* and hence may not be excluded by a declaration of default. California Civil Code Section 2033(a) provides that a request for admissions may be served on any party who has been served with a summons.[18] *See Zorro Investment Co. v.*

[18]The legislative purpose of the request for admissions statute is to determine triable issues of fact. Such a purpose is separate from that of a responsive *pleading* which is to join as many issues as possible. *Zorro, supra.* Hence, an answer to a request for admission is not deemed a responsive *pleading* within the meaning of *Jones, supra.* The ruling of *Jones* operates to exclude parties, not evidence; and although it operates to divest a defaulting party of his right to appear in opposition in Court, it does not divest the Court of its power or the right to procure evidence. By analogy, the exclusion of a party who has not answered a complaint and who is therefore in default cannot prevent the excluded party from answering the request for admissions. Where evidence is taken after default, as was done in the instant cause, evidentiary matter may be obtained by any means from any party who has ben *served with Summons.* §2033(a) California Code of Civil Procedure. An extension of *Jones* to a

(Continued on Page 19)

Great Pacific Securities Corp., 69 Cal.App. 3d 907, 138 Cal. Rptr. 410 (1977). Moreover, in *McKim v. McKim*, 6 Cal.App. 3d 673, 100 Cal.Rptr. 140, 493 P.2d 868 (1972), the court specifically held that under California law a party in default in a dissolution proceeding could appropriately give testimony.

Fred had the right to a direct appeal on this issue of the propriety of the manner of proof. *E.g., Zorro Investment Company, supra.* He chose not to do so. There is no question but that under California law a party in default has the right to appeal from a judgment and particularly on the grounds of an excessive or improper award. *Uva v. Evans*, 83 Cal.App. 2d 363, 364, 147 Cal.Rptr. 795, 800 (1978); *Buck v. Morrossis*, 114 Cal.App. 2d 461, 250 P.2d 270 (1952); *Richee v. Gillette Realty Co.*, 97 Cal.App. 365, 275 P. 477 (1929).

Petitioner's second point is that the facts deemed admitted were incorrect, and had the effect of grossly overstating his net worth, relying primarily on the facts found at a bond hearing before the District Court *three years* after entry of the California judgment. Fred's net worth in 1976 was not before the Court during the bond hearing which Fred did not attend despite a subpoena served on him requiring his attendance. Proceedings on the bond determination is an entirely different matter than the underlying judgment and

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(Footnote 18 Continued)

defaulting party failing to answer request for admissions would divest the non-defaulting party of his right to request admissions where, in fact, such request for admissions are designed to protect the active litigants. any interpretation which would prevent the expenditious determination or elimination of triable issues of fact would clearly be against public policy and judicial economy. Nothing in the law and nothing in the California Constitution, codes or cases or under the U.S. Constitution or law prohibits a defaulting party, when requested, from testifying or giving evidence.

should not even be considered in ruling on the Petition for Writ of Certiorari.[19]

The Court of Appeals reviewed the propriety of a collateral attack under federal principles of law on the grounds here asserted: that the method of proof may have had the effect of overstating Fred's net worth thus constituting such manifest injustice as would permit a collateral attack. (App. at A-18 to A-23.) The Fifth Circuit correctly concluded that this case does not fall within the narrow exception permitting a collateral attack. (App. at A-23.)[20] In distinguishing this case from *Bass v. Hoagland*, 172 F.2d 205 (5th Cir. 1949) *cert. denied*, 359 U.S. 816, the Court of Appeals remarked as follows:

> Also, unlike the defendant in *Bass*, Fred was served with the property division judgment and therefore might have appealed it or moved to set it aside under the more lenient "six month" rules. *See*

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[19]The Court below did not find that the judgment exceeded Fred's net worth many times over as of the date it was entered. The only proof regarding Fred's net worth taken during hearings on bond to be posted pending appeal was to ascertain Fred's worth in *1979* not as of *1976*.

Nor has it ever been proven by Petitioner that the value of the parties' assets were less than that stated in the California judgment at the time said judgment was entered. Similarly, though the Court "found" in the bond hearing that Fred's total "net worth" was approximately $600,000 it also set bond at $1,500,000. Fred posted an amount equal to the bond by depositing a portion of the *exact securities* described in the California court's findings of fact. The $600,000 figure resulted from the fact that Fred had transferred many millions of dollars worth of assets to a revocable trust. (Jt.App. at 163.) As further security pending appeal, the District Court also enjoined transfer or disposition of the trust assets as well as other assets. (Jt.App. at 170-171.)

[20]As the dissent in *Bass* points out, it is questionable whether such an exception to the prohibition on collateral attack exists if jurisdiction was properly exercised by the first court and no appeal was taken. *See Kremer* and *Underwriters, supra*, which suggest the correctness of the *Bass* dissent.

> Cal.Code Civ.Pro. §473 (allowing relief from judgment within six months for, *inter alia*, surprise and excusable neglect). Finally, in *Bass*, the court gave considerable emphasis to the denial of the defendant's Seventh Amendment right to a jury trial. 172 F.2d at 209, 210. Unlike in *Bass*, Fred does not claim a constitutional right to a jury trial in the California state court, nor did Fred make a demand for a jury trial.

(App. at A-21.)

This Court has stated that no hearing is required by the Due Process Clause when a defendant is in default. *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed. 2d 113 (1971). Fred was not foreclosed from presenting or contesting evidence concerning the valuation of the marital estate in the California proceeding. Even though he did not appear at the default proceeding, Fred could still have moved to vacate that default and to set aside the judgment, or, he might have appealed the default judgment in the California proceeding. He failed to do either and, accordingly, he has had all the protection due him by law.

B. The California Petition Encompassed a Demand for Cash Offset and the California Court had Complete Discretion to Award All Assets to One Spouse with an Equal Cash Award to the Other Spouse which Discretion was Properly Exercised Under the Circumstances Presented

Petitioner argues that under California law, the relief granted (a cash offset) was in excess of the prayer for relief and thus void. Petitioner also argues that the type of relief granted was not authorized by statute. The latter argument is not carried to a conclusion that if not authorized by statute, the judgment was in excess of the Court's power; however, the contention was made and rejected below, both

as to the legal validity of the conclusion and as a permissible grounds for collateral attack.

The contention that the judgment is void under California law because in excess of the prayer for relief is clearly refuted by *Badillo v. Badillo*, 123 Cal.App. 3d 1009, 177 Cal.Rptr. 56 (1981). In *Badillo* the wife filed her Petition for Dissolution under the Family Law Act. The Petition requested that property rights "be determined as provided by law." She did not make any request for specific assets or manner of division of property. Husband was personally served, but allowed a default judgment to be entered. In its judgment, the court awarded certain assets to Husband and Wife and also gave Wife the family residence. Husband did not appeal the judgment. Later, Husband filed suit against Wife's estate claiming an interest in the family residence awarded to Wife in the dissolution judgment. The trial court found against Husband. On appeal, Husband contended that the dissolution judgment was in excess of the wife's prayer and thus void and subject to collateral attack. The California Court of Appeal disagreed holding that although the division may not have been in compliance with the equal mandates of California Civil Code §4800, the relief awarded was within the scope of the prayer for disposition "according to law." Therefore, the judgment was not void or subject to collateral attack (although it may have been an abuse of discretion subject to direct appeal).

As in *Badillo*, the prayer for relief in Verone's California Petition requested that "property rights be determined as provided by law." (Jt.App. at 7.) Thus, Petitioner's argument that the judgment in the instant case was void because in excess of the prayer for relief is directly contradicted by *Badillo*.

In an attempt to manufacture a federal due process claim based upon the language of the prayer for relief,

Petitioner claims in his Petition that the *Badillo* decision is inapplicable because it was rendered some seven years after he defaulted. He reasons that he did not have constitutional notice of this decision at the time he decided to default and, therefore, he should not be bound by the interpretation of the prayer for relief given by *Badillo.* However, the notice required under the Due Process Clause is notice of the pendency of the proceedings. Moreover, *Badillo* considered the import of a ruling entered at least two years *before* Verone filed suit in California.[21]

Petitioner's continued reliance on *Wilkinson v. Wilkinson* 12 Cal.App. 3d 1164, 91 Cal.Rptr. 372 (1970) is misplaced. In *Wilkinson* the wife prayed that specific community property be awarded to her and the court awarded a cash offset. Therefore, the judgment was in excess of the prayer for relief. In this case, Verone did not request any specific award of community property. Fred was served with the Summons and Complaint wherein Respondent requested that she be accorded property as provided by California law and wherein in she claimed that the community estate was in excess of $15,000,000. Fred was thereby notified that Verone could obtain at least one-half of that amount from the California courts, but Fred intentionally refused to take part in the California proceedings.[22]

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[21]Even if the judgment did exceed the prayer for relief the entire judgment is not void but only that portion which exceeds the prayer. *See Becker v. S.P.V. Construction Co. Inc.*, 27 Cal. 3d 489, 165 Cal.Rptr. 825, 828, 612 P.2d 915 (1980). The Fifth Circuit therefore limited the judgment to one-half of the maximum amount alleged as community property by Verone's Petition. See n.11, *supra.*

[22]Assuming arguendo that the judgment did exceed the prayer for relief, Petitioner's basis for collateral attack could only be based on the notions that full faith and credit requires that a judgment be given only as much preclusive effect as the state courts would give it. Contrary to Petitioner's assertions, a judgment would not be void under federal law if the relief granted exceeds the prayer for relief. As is typical of the

(Continued on Page 24)

Petitioner further alleges that the California judgment is not entitled to full faith and credit because the California court was required to divide the marital property "in kind" as opposed to the cash offset used. Petitioner intentionally ignores the fact that the California Supreme Court has explicitly and unequivocally held that the determination as to the method of division (in kind, cash offset, or combination of those methods) is entirely within the sound discretion of the trial court. *In re Marriage of Connolly*, 23 Cal. 3d 590, 603, 153 Cal.Rptr. 423, 591 P.2d 911 (1979); *In re Marriage of Fink*, 25 Cal. 3d 877, 160 Cal.Rptr. 516, 603 P.2d 881 (1979).[23] In *Emmett v. Emmett*, 109 Cal.App. 3d 753, 169 Cal.Rptr. 473 (1980) the court stated:

> Nothing in the language of Civil Code section 4800 requires a distribution of the community property in kind. The mandate of that section is that the community property must generally be divided

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(Footnote 22 Continued)

Petition, the case cited by Petitioner for the proposition that "a judgment in excess of the prayer is void and subject to collateral attack" under federal law is completely devoid of any reference to the proposition for which it is cited. The closest reading of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) fails to provide any support for Petitioner's argument. In fact, the law is to the contrary. Such a judgment is *not* void under federal law and thus is not subject to collateral attack on the ground that the right involved in the suit did not embrace the relief granted. *See Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932); *Walling v. Miller*, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944).

[23]Petitioner's statement that no California case can be found that would support a cash award of community property is totally in error. *See, e.g., Weinberg v. Weinberg*, 67 Cal. 2d 557, 63 Cal.Rptr. 13 (1967); *Phillips v. Phillips*, 152 Cal.App. 2d 582, 313 P.2d 630 (1957); *Pope v. Pope*, 102 Cal.App. 2d 353, 227 P.2d 867 (1951).

equally. An equal division is not necessarily equated with a division in kind.

Thus, the Court's award herein of all assets to Fred and cash equal to one-half of the assets to Verone was not in excess of the Court's powers and not subject to collateral attack.[24]

C. Petitioner Could Have Appealed from the California Judgment if He Felt It Was Improper but May Not Now Launch a Collateral Attack on California Community Property Laws.

Petitioner's final argument regarding "error" by the California trial court is that the California Judgment on Property violated California's quasi-community statute, Civil Code Section 4803 as limited by *Addison v. Addison*, 62 Cal. 2d 558, 43 Cal.Rptr. 97, 399 P.2d 897 (1965) and *In re Marriage of Roesch*, 83 Cal.App. 3d 96, 147 Cal.Rptr. 586 (1978), *cert. denied*, 400 U.S. 915 (1979). As the Court of Appeals in its decision of August 6, 1982 remarked, Petitioner

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[24]In the exercise of its discretion regarding distribution of assets, the California court was forced to deal with the problem that most of the assets were freely transferable securities and cash; that all assets had been removed from California and were in the possession and control of a party who would not obey California court orders; that the same may have been disposed of during the lengthy period between filing of the action and the final trial of the issues of asset distribution. All of these factors dictated the cash award in the sound discretion of the California trial court. Additionally, the largest single asset identified was the stock owned by the parties in the Fehlhaber Corporation. The trial court had before it Fred's affidavits regarding the Corporation stating that he was the sole shareholder of that corporation and that he controlled all activities and made all business decisions for that corporation. The Court may have properly concluded that the circumstances more than justified allowing Fred to retain ownership of the parties' business and thus avoid conflict. *E.g., In re Marriage of Winn*, 98 Cal.App. 3d 363, 159 Cal.Rptr. 554 (1979); *In re Marriage of Clark*, 80 Cal. App. 3d 417, 145 Cal.Rptr. 602 (1978) (court has discretion to award stock in a closely held corporation to one party and give the other a cash offset).

did not properly preserve this issue for appeal. Moreover, even if the point had been properly preserved, the contention is entirely without merit.

The Fifth Circuit pointed out that Fred made only an oblique, ambiguous reference to some purported "constitutional" problem in his answer to the supplemental complaint and in his motion for a new trial. (App. at A-24.) Fred did not develop this argument in "his briefs to the Court, through oral argument, or through citation of authority." (App. at A-24.) He never raised this point in his memorandum opposing the motion for summary judgment. Nor did he raise this point in his pretrial stipulation. Accordingly, the Fifth Circuit concluded the issue has been abandoned. *Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co.*, 629 F.2d 1118 (5th Cir. 1980); *U.S. v. Indiana Bonding and Surety Company*, 625 F.2d 26, 29 (5th Cir. 1980); *Tedder v. FMC Corp.*, 590 F.2d 115 (5th Cir. 1979); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 263 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 650, 13 L.Ed. 556.

Petitioner claims that this quasi-community property argument should be allowed on his appeal although he had not preserved the issue below on the basis of fundamental fairness, citing *Compton v. Alton Steamship Company, supra.* As explained, *supra*, *Compton* is totally inapposite to this case. Additionally, even if the argument were properly preserved for appeal it would not be grounds for denying the California judgment its preclusive effect.

Petitioner raised the same argument in his motion to quash service in the California court wherein he contended that domicile was necessary under California law in order for the court to have jurisdiction to award support and *property.* The California court ruled against Fred on this contention, holding that residence alone was sufficient although

the parties may or may not have been domiciled in California.[25] Fred had the opportunity to attack this ruling in the California courts by direct appeal or by motion to vacate, but did nothing. That ruling is not now subject to collateral attack under California law.

The parties lived in California for many years and owned property, some of which may have been acquired before moving from New York to California. Property so acquired might have been labeled as "quasi-community" if the same were not comingled with community property; however, if comingled all of the property would simply become community property.[26] If petitioner participated in the California proceedings, he might have produced evidence to permit a distinction for the purpose of his present and unfounded argument; however, such was not the case and Petitioner has not now identified any asset designated as "quasi-community."

The allegation that the California statute is unconstitutional does not provide a basis under federal due process concepts for collateral attack. It is well established that even where a judgment is predicated upon a statute later declared unconstitutional, that fact does not provide a basis for collateral attack. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981); *Elgin National Watch Co. v. Barrett*, 213 F.2d 776 (5th Cir. 1954). Thus, even if the California quasi-community statute were deemed to violate some provision of the Constitution, which is vigorously denied, Petitioner may not now raise that issue as a basis for collateral attack on the California judgment.

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[25]See n.5, *supra*, and accompanying text. *See also* Jt.App. at 33-57.

[26]For example, the Court found that the interest in Fehlhaber Corporation had become so comingled that it was community not quasi-community property. (Jt.App. at 130.)

CONCLUSION

Based upon the foregoing, the Petition for Writ of Certiorari to review the determination of the Court of Appeals for the Fifth Circuit should be denied.

DATED: Miami, Florida
June 20, 1983

Respectfully submitted,

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No. 82-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT F. FEHLHABER, as Personal Representative of Fred Robert Fehlhaber, deceased,

Petitioner,

—v.—

VERONE MARIN FEHLHABER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

PETITIONER'S REPLY BRIEF

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No. 82-1883

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (UNIT B)

I

This Case Presents Significant and Unresolved Questions of Constitutional Due Process

Respondent asks this Court to shut its eyes to grave violations of petitioner's due process rights for the same reason erroneously adopted by the Fifth Circuit. Respondent maintains that because Fred was sent formal *notice* of the California proceedings, the $10 million California default judgment is immune from constitutional scrutiny, and that the federal

courts are powerless to correct the "egregious" errors committed in this case.

But, unlike the Fifth Circuit, the Supreme Court has never accepted mere notice as a proxy for due process. This Court recently emphasized that "even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, '[r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.' *Montana* v. *United States*, 440 U.S. 147, 164 n.11 (1979)." *Haring* v. *Prosise*, ____ U.S. ____, 103 S. Ct. 2368, 2375 (1983). Surely there is "reason to doubt" the quality, extensiveness and fairness of the procedures followed in this litigation, which the Court of Appeals branded "a case of injustice."

The Fifth Circuit's decision—affirming a summary judgment, issued without discovery—is untrue to the spirit of Supreme Court precedent, and flatly conflicts with *Compton* v. *Alton Steamship Co.*, 608 F.2d 96, 107 (4th Cir. 1979), where the Fourth Circuit recognized the centrality of "fundamental fairness and considerations of justice" to constitutional due process. *See* Pet. at 16-17.[1] Respondent, like the courts below, has failed to cite a *single* case upholding a judgment infected with constitutional errors of the magnitude presented

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1 Respondent erroneously attempts to distinguish *Compton* on the ground that no "collateral attack" was involved there. (Res. Br. at 10-11.) Respondent ignores *Compton's* holding that the judgment before it was "void as a matter of law," 608 F.2d at 107, and therefore subject to collateral attack. By contrast, the Fifth Circuit found the California judgment merely *voidable*, and subject only to direct attack. That distinction, which respondent overlooks, is of paramount importance here. Nor may *Compton* be meaningfully distinguished because it involved a federal, rather than a state, court judgment. (Res. Br. at 11 n.12.) As this court held last term, federal due process principles apply to both state and federal judgments. *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

here—errors which go to the fundamental power of the California court to act.

Review by this Court is necessary to set right this "case of injustice." Fred is the victim of respondent's gross overreaching and the "egregious" errors of a California judge *pro tem*, leading to a $10 million judgment which far exceeded his net worth. This Court should not permit such an abuse.

Review is also warranted to clarify constitutional issues of general importance. This Court has not ruled on recurring issues of due process and full faith and credit in marital litigation for over 25 years. *See Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). Nor has it *ever* ruled upon the constitutional limits on the application of state community property law to foreign property.

Respondent's brief does not come to grips with these significant issues. Instead, she attempts to make light of the shocking errors in the California proceedings, going so far as to call this case, which so troubled the Court of Appeals, a "simple collection proceeding"! (Res. Br. at 8.)

These glib arguments are not based upon any evidence in the record in this case. To the contrary, respondent relies upon allegations which she *concedes* "do not appear of record" (*id.* at 4 n.3), and which bear no relation to anything in the proceedings conducted below or in California. It is settled law that review in this Court is strictly confined to the record compiled below. *Thomson* v. *Gaskill*, 315 U.S. 442, 446-47 (1942) (Frankfurter, J.). Although respondent displays her pique at our presentation of "disputed" facts (Res. Br. at 4 n.4), she ignores the fact that, on summary judgment, all inferences must be drawn in favor of *petitioner*. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). There is no excuse for respondent's eleventh-hour attempt to change the record.

In any case, neither the unsworn and undocumented assertions of respondent's counsel, nor her other arguments, suc-

ceed in explaining away the three major due process violations committed here:

1. *Lack of Any Evidence to Support the Default Judgment.* Our petition showed that the California court acted without receiving *any* proof as to the existence, identity, or amount of the alleged marital property. Respondent presented, and the California court blindly accepted, a list of Fred's alleged assets which *on its face* lists and counts twice millions of dollars of the same securities. Respondent counters with the sudden discovery that her asset list was allegedly based upon extra-record "evidence" which respondent never saw fit to present in California, or to the district court in this case, or to the Fifth Circuit. (Res. Br. at 17.) We know of no "evidence" which supports the distortions in respondent's asset list. Nor could any evidence, inside or outside the record, conceivably support counting millions of dollars of identical securities twice. Respondent's submission to the California court was an outright fraud.

Respondent argues in the alternative that these falsehoods are now *res judicata* because Fred "failed" to respond to her request to admit the accuracy of the asset list. However, under California procedure, a party in default is "out of court," and therefore *barred* from responding to such a request. *Mackie* v. *Mackie*, 186 Cal. App. 2d 825, 9 Cal. Rptr. 173, 178 n.5 (1960). *Accord*, *J.M. Wildman, Inc.* v. *Stults*, 176 Cal. App. 2d 670, 1 Cal. Rptr. 651, 654 (1959). As respondent concedes, the rule of *Jones* v. *Moers*, 91 Cal. App. 65, 266 P. 821 (1928) "operates to exclude parties." (Res. Br. at 18, n.18.) Yet, only an active party is capable of making a binding judicial admission. It follows that any response to the request for admissions filed by Fred would have been void.[2] The absence of a response from Fred is not a substitute for evidence.

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2 Respondent points out that a non-party may sometimes be required to respond to discovery requests. (Res. Br. at 18-19.) However, in California practice, a request for admissions is *not* a discovery device. *Hillman* v. *Stultz*, 263 Cal. App. 2d 848, 70 Cal. Rptr. 295, 317 (1968);

2. *Failure to Divide the Property in Kind.* On this point, respondent, like the Fifth Circuit, relies primarily upon *Badillo* v. *Badillo*, 123 Cal. App. 3d 1009, 177 Cal. Rptr. 56 (1981). However, *Badillo* is inapposite because it did not involve an all-cash award remotely similar to the judgment at issue here. *Badillo* was a garden-variety marital action, where the court awarded cash in lieu of a *particular* asset which could not practicably be divided.

Respondent next contends inaccurately that petitioner is "in error" in arguing that "no California case can be found that would support a cash award of community property." (Res. Br. at 24, n. 23.) This argument is a straw man. We never argued that a cash award is improper in all circumstances. California courts routinely award cash to balance particular assets which—unlike the property allegedly involved here—cannot practicably be divided. It is upon just such cases that respondent relies in her brief. *See, e.g., Badillo, supra*; *Weinberg* v. *Weinberg*, 67 Cal. 2d 557, 63 Cal. Rptr. 13, 432 P.2d 709 (1967); *Emmett* v. *Emmett*, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (1980). We *do* maintain that the all-cash award issued to respondent was—and remains—totally unprecedented in California jurisprudence. Respondent fails to identify any case which calls our position into question. The California judgment clearly exceeded any relief which could reasonably have been expected by a defendant in default.

3. *The Application of California Community Property Law to Out-of-State Property.* The petition demonstrated that the California court exceeded its subject matter jurisdiction by purportedly applying California law to Fred's Florida and New York property. Here again respondent embarks on an extra-

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Haseltine v. *Haseltine*, 203 Cal. App. 2d 48, 21 Cal. Rptr. 238, 247 (1962). The federal rule is similar. *Kantor* v. *Cycles Peugeot, S.A.*, 36 F.R. Serv. 2d 230 (D.R.I. 1983) (compliance with request for admission is "akin to filing of an answer," and not "a discovery proceeding"). A request for admissions thus may not be addressed to, or responded to by, a party in default.

record excursion, claiming—contrary to the evidence—that Fred and Verone "lived in California for many years." (Res. Br. at 27.) Unsworn assertions by respondent's counsel do not make it so. The record establishes conclusively that the parties did *not* have the close connections with California required under the *Roesch* test. *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1978), *cert. denied*, 440 U.S. 915 (1979). *See* Pet. at 14-16.[3]

This "egregious error" is not a mere mistake correctible only on direct appeal. The California court's attempt to adjudicate rights in foreign property was an action beyond the limits of its subject matter jurisdiction (both because Fred did not join in the request and because he was not domiciled in California) which cannot be accorded full faith and credit. As this Court recently reaffirmed in *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691 (1982), a default judgment issued by a court lacking subject matter jurisdiction is *always* subject to collateral attack.

In short, notwithstanding respondent's attempt to sanitize the record, the constitutional errors of the California court are manifest. That court acted without receiving any evidence; exceeded the prayer by issuing an unprecedented all-cash award; and overstepped its constitutional power by applying

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3 Respondent makes a curious argument that "residence" is equal to "domicile" under California law, and that the first prong of the *Roesch* test is therefore satisfied. Respondent concedes by her silence that the second requirement of *Roesch*—a decision by *both* spouses to seek alteration of their marital status in a California court—is absent. Moreover, respondent's equation of domicile and residence is based upon a misreading of *Cooper* v. *Cooper*, 269 Cal. App. 2d 6, 74 Cal. Rptr. 439 (1969). *Cooper* merely states that for one purpose one-year's residence is equivalent to "domicile" in that it gives a state constitutional power to alter the plaintiff's marital status, but *not* to adjudicate property rights of the parties. *See Whealton* v. *Whealton*, 67 Cal. 2d 656, 660, 63 Cal. Rptr. 291, 432 P.2d 979 (1967). As this Court has recognized, the power to award a divorce is fundamentally distinct from the power to determine rights in alleged marital property. *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416 (1957). Accordingly, *Roesch* explicitly requires more than mere residence before a California court may assert jurisdiction over foreign property.

California law to foreign property. We submit that "fundamental fairness and considerations of justice" demand that this tainted judgment not be awarded full faith and credit. A writ of certiorari should issue so that this Court can rectify the constitutional violations committed here, review the significant questions presented in the record, and resolve the conflict between the Fifth and Fourth Circuits.

II

Respondent's Reliance on Alleged Evidence Outside the Record Highlights The Impropriety of Summary Judgment

The petition showed that the sensitive constitutional issues in this case should not have been disposed of against Fred on summary judgment, especially over Fred's pleas for discovery on crucial issues. Respondent's heavy reliance on allegations outside the record graphically proves our point. When the prevailing party must stray so far from the record to try to support a ruling in her favor, *a fortiori*, summary judgment is improper. If "it was clearly appropriate for the district court to enter summary judgment on the basis of the record before it," as respondent asserts (Res. Br. at 28), then why didn't she stick to that record in her brief?

Significantly, respondent's alleged extra-record "evidence" apparently pertains to the very areas in which petitioner sought discovery—the parties' connections with California, the extent and nature of the alleged marital property, and the distortions in respondent's submissions to the California court. Discovery on these matters would have enabled Fred to make a record on the quasi-community property issue—the same issue which the Fifth Circuit held presented questions of fact which should have been resolved in the trial court.[4] Under basic principles of

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4 Respondent suggests (Res. Br. at 8, n.10) that Fred's right to take discovery was satisfied by a staged deposition of respondent conducted in California by her own attorneys. That suggestion is ludicrous. Fred noticed a deposition of respondent to be held in Florida, the jurisdiction in which respondent filed this action. At respondent's behest, the trial court delayed the deposition until seven days before trial. Under

due process, Fred certainly was entitled to take discovery on the merits before entry of a judgment against him for $10 million plus interest.

The "lethal weapon" of summary judgment, *Brunswick Corp.* v. *Vineberg*, 370 F.2d 605, 612 (5th Cir. 1967), was improperly and unfairly deployed in this case. If the Court declines to order full review, certiorari should be granted and the case remanded to the district court, pursuant to 28 U.S.C. § 2106, to give petitioner a fair opportunity to present this case on a full factual record.

Dated: New York, New York
August 10, 1983

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the district court's order, Fred clearly had a right to take that deposition in the event summary judgment was not granted in his favor. By disposing of this case short of trial, the district court deprived Fred of his fundamental right to discovery on the merits.